(5)

No. 83-2146

In The

Supreme Court of the United States

October Term, 1984

RICHARD WILSON and MARTIN VIGIL, *Petitioners,*

v.

GARY GARCIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

Bruce Hall
Diane Fisher
Ben M. Allen
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

Counsel for Petitioners

Steven G. Farber
411 Hillside Avenue
Post Office Box 2473
Santa Fe, New Mexico 87504
Telephone: (505) 988-9725

Richard Rosenstock
Post Office Box 186
Chama, New Mexico 87520
Telephone: (505) 765-2517

Counsel for Respondent

PETITION FOR WRIT OF CERTIORARI FILED JUNE 28, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

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GARY GARCIA, Plaintiff-Appellee

vs.

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-1017

—o—

GARY GARCIA, Plaintiff-Appellee,

vs.

RICHARD WILSON, Defendant,

MARTIN VIGIL, Defendant-Appellant.

STATE OF NEW MEXICO,
Amicus Curiae.

—o—

DOCKET ENTRIES

Date	Proceedings
3/30/84	OPINION FILED. Published, signed opinion filed. En banc panel. Writing Judge is Seymour

4/ 9/84	OPINION REMARK. Correction to pages 2, 12 and 13 of opinion filed 3/30/84 (parties served by mail)
4/23/84	MANDATE ISSUED. Mandate issued to district court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-1018

—o—

GARY GARCIA, Plaintiff-Appellee,

vs.

RICHARD WILSON, Defendant-Appellant,

MARTIN VIGIL, Defendant.

STATE OF NEW MEXICO,
Amicus Curiae.

—o—

DOCKET ENTRIES

Date	Proceedings
3/30/84	OPINION FILED. Published, signed opinion filed. En banc panel. Writing Judge is Seymour
4/ 9/84	OPINION REMARK. Correction to pages 2, 12, and 13 of opinion filed 3/30/84 (parties served by mail)
4/23/84	MANDATE ISSUED. Mandate issued to district court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 82-0092 HB

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually, and MARTIN VIGIL, individually,

Defendants.

COMPLAINT
(Filed January 28, 1982)

I. PRELIMINARY STATEMENT

This is a federal civil rights action brought by the Plaintiff against Richard Wilson, former New Mexico State Police Officer, and Martin Vigil, Chief of the New Mexico State Police, in their individual capacities. Plaintiff seeks money damages to compensate him for the deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and for the personal injuries he suffered which were caused by the acts and omissions of the Defendants acting under color of law. Plaintiff alleges that he was unlawfully and severely beaten and sprayed with teargas by Defendant Wilson. It is further alleged, inter alia, that prior to Defendant Wilson's employment as a New Mexico State Police Officer, Defendant Vigil knew, or should have known, of Defendant Wilson's propensity for unlawful behavior but he nevertheless allowed and caused Defendant Wilson to be hired as a New Mexico State Police Officer, and that while Defendant Wilson was a New Mexico State Police Officer, Defendant Vigil failed to properly and adequately discipline, train and control

Defendant Wilson. It is further alleged that acts and omissions of Defendant Vigil directly caused the injuries and violations of civil rights suffered by the Plaintiff.

II. JURISDICTION

1. The amount in controversy is in excess of $10,000.00, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343(3)(4) and 42 U.S.C. § 1983, and the aforementioned Constitutional provisions.

III. PARTIES

2. PLAINTIFF GARY GARCIA is a resident of Rio Arriba County, State of New Mexico and was such a resident at all times material herein.

3. DEFENDANT RICHARD WILSON is a resident of Lea County, New Mexico and at all times relevant herein was a police officer employed by the New Mexico State Police, acting under color of state law and within the course of his employment. He is sued in his individual capacity.

4. DEFENDANT MARTIN VIGIL is a resident of Rio Arriba County, New Mexico and at all times relevant herein was the Chief of the New Mexico State Police employed by the New Mexico State Police, acting under color of state law and within the course of his employment. He is sued in his individual capacity.

IV. CAUSE OF ACTION

5. PLAINTIFF incorporates by reference herein the allegations contained in paragraphs one through four of this Complaint.

6. On or about April 27, 1979, PLAINTIFF GARY GARCIA, who was then a minor, was in the Village of Al-

calde, Rio Arriba County, New Mexico, and was unlawfully taken into custody by the New Mexico State Police.

7. DEFENDANT WILSON was given custody of PLAINTIFF and DEFENDANT WILSON, without justification, provocation, or probable cause, abused PLAINTIFF GARY GARCIA in violation of the clearly established Constitutional rights of the PLAINTIFF.

8. Thereafter, without provocation or justification, and in violation of the clearly established rights of the PLAINTIFF, DEFENDANT WILSON brutally and viciously beat PLAINTIFF about his face and body with a "slapper" and then DEFENDANT WILSON continued his unlawful and excessive assault and battery against PLAINTIFF by spraying the Plaintiff in the face with teargas. These acts of DEFENDANT WILSON caused the injuries suffered by the PLAINTIFF.

9. The incident of April 27, 1979, involving PLAINTIFF and DEFENDANT WILSON occurred just four days after DEFENDANT WILSON participated in a vicious assault against Merry Noel Sayas and Simona Maestas, residents of Rio Arriba County, New Mexico, and several months after he had violently abused another Rio Arriba County resident.

10. The incident of April 27, 1979, involving PLAINTIFF and DEFENDANT WILSON occurred just four days after DEFENDANT VIGIL was placed on notice of the violent propensities of DEFENDANT WILSON stemming from the Sayas incident, and DEFENDANT VIGIL knew, or should have known, about the violent propensities of DEFENDANT WILSON.

11. DEFENDANT VIGIL did not suspend, or take disciplinary, or any other action, against DEFENDANT WILSON after the Sayas incident to remove DEFEND-

ANT WILSON from citizen contacts where DEFENDANT WILSON could continue his known propensity to abuse citizens and violate their Constitutional rights.

12. Prior to his employment with the New Mexico State Police, DEFENDANT WILSON had been convicted of a variety of serious criminal offenses in several states, and this information was known or reasonably should have been known by DEFENDANT VIGIL prior to the incident between PLAINTIFF and DEFENDANT WILSON.

13. Prior to DEFENDANT WILSON'S employment with the New Mexico State Police, there were arrest warrants outstanding against DEFENDANT WILSON in the States of Minnesota and North Dakota, and these facts were known by DEFENDANT VIGIL, or should have been known by DEFENDANT VIGIL.

14. Prior to DEFENDANT WILSON'S employment with the New Mexico State Police, DEFENDANT VIGIL had received information that DEFENDANT WILSON had been fired for stealing from his employer, Shakey's Pizza, in Fargo, North Dakota.

15. Prior to DEFENDANT WILSON'S hiring by the New Mexico State Police, DEFENDANT VIGIL, Chief of the New Mexico State Police, had been advised by two high ranking New Mexico State Police Officers, who had investigated DEFENDANT WILSON'S employment application with the New Mexico State Police, that DEFENDANT VIGIL should not hire DEFENDANT WILSON as a New Mexico State Police Officer.

16. DEFENDANT VIGIL, acting in a negligent, grossly negligent and/or reckless manner, failed to perform an adequate background screening investigation on

DEFENDANT WILSON and/or failed to take adequate action after the background screening check on DEFENDANT WILSON was completed and allowed DEFENDANT WILSON to be hired as a New Mexico State Police Officer, and that said failures on the part of DEFENDANT VIGIL were direct cause of the injuries suffered by PLAINTIFF.

17. DEFENDANT VIGIL, acting in a negligent, grossly negligent, and/or reckless manner, failed to adequately train, supervise or discipline DEFENDANT WILSON, or otherwise control said defendant's known propensity for violence, and that said failures on the part of DEFENDANT VIGIL were the direct cause of the injuries suffered by PLAINTIFF.

18. The actions of the Defendants were part of a pattern, practice and course of conduct engaged in by said Defendants and other members of the New Mexico State Police, and constituted a deprivation of PLAINTIFF'S Constitutional rights, said rights being guaranteed to PLAINTIFF under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983.

19. Each of the individual Defendants, separately and in concert, acted under color of state law outside the scope of their jurisdiction and without authorization of law, and each of said Defendants acted willfully, knowingly and purposefully with the specific intent to deprive PLAINTIFF of his rights outlined in this Complaint.

20. Those Defendants who did not act intentionally, acted negligently, grossly negligently and in reckless disregard for PLAINTIFF'S rights as set out in this Complaint.

21. As a direct and proximate result of the aforesaid acts of Defendants, PLAINTIFF GARY GARCIA suffered and continues to suffer extreme physical pain and discomfort; extreme mental anguish; humiliation and embarrassment; medical expense; and violation of his civil rights.

WHEREFORE, PLAINTIFF prays for judgment against the Defendants, and each of them, jointly and severally, as follows:

1. Compensatory damages in a sum to be set by the jury;

2. Punitive damages, because of the nature of the acts of the Defendants, in the sum of $100,000.00;

3. For reasonable attorney fees and costs of suit incurred herein; and

4. For such other and further relief as the Court deems just and proper.

A JURY TRIAL IS DEMANDED.

Respectfully submitted,

/s/ STEVEN G. FARBER
208 Griffin Street
P.O. Box 2473
Santa Fe, New Mexico 87501
505/988-9725

ATTORNEY FOR PLAINTIFF,
GARY GARCIA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV-82-0092 C

GARY GARCIA,
Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,
Defendants.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

COME NOW Richard Wilson and Martin E. Vigil, Defendants in the above-entitled cause, by and through their attorney John W. Cassell, Assistant Legal Advisor to the New Mexico State Police, and Special Assistant Attorney General for the State of New Mexico, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, and Rule 9b and 9c, Rules of the United States District Court for the District of New Mexico, and hereby move this honorable Court as follows:

1. That the Court finds the applicable statue of limititations governing causes of action brought pursuant to 42 U.S.C. §1983 alleging the facts contained in Plaintiff's complaint is that provided in Section 41-4-15A, N.M.S.A., 1978.

2. That the Court dismiss the above-entitled cause on the grounds that it is barred by the applicable statute of limitations as untimely filed.

3. In the alternative, that the Court grant leave to these Defendants, pursuant to 28 U.S.C. §1292, to take an

interlocutory appeal on this issue to the United States Court of Appeals for the Tenth Circuit.

The grounds for this motion are fully explained in the brief in support attached hereto and made a part hereof.

It is affirmatively stated that opposing counsel was not contacted for concurrence as it was assumed that, in view of the subject matter of this motion, it could not be obtained.

WHEREFORE Defendants pray this honorable Court grant the relief requested herein or, in the alternative, the alternative relief requested herein, and such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ JOHN W. CASSELL
Special Assistant Attorney General
Assistant Legal Advisor
New Mexico State Police
P. O. Box 1628
Santa Fe, New Mexico 87501
(505) 827-5141

I hereby certify that a
true and correct copy
of this document was
mailed to all counsel of
record on this _____day
of February, 1982.

/s/ JOHN W. CASSELL

IN THE UNITED STATES DISTRICT C[illegible]T
FOR THE DISTRICT OF NEW MEXIC[illegible]

CV No. 82-0092 C

GARY GARCIA, Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,
Defendants.

RESPONSE TO MOTION TO
DISMISS FILED BY DEFENDANT VIGIL
(Filed February 18, 1982)

The Plaintiff, by his counsel, responds to the Motion to Dismiss filed by Defendant Vigil, and moves this Court to deny the Motion to Dismiss on the grounds that it is not well taken.

Respectfully submitted,

/s/ STEVEN G. FARBER
208 Griffin Street
P.O. Box 2473
Santa Fe, New Mexico 87501
505/988-9725

ATTORNEY FOR PLAINTIFF,
GARY GARCIA

I hereby certify that I
mailed a copy of the above
Response to opposing counsel
of record, Ben Allen, Esq.
P. O. Box 1888, Albuquerque,
NM 87103, and Robert Cassell,
Esq., New Mexico State Police,
P. O. Box 1628, Santa Fe, NM
87501, this 18th day of
February, 1982, by first class
mail, postage prepaid.

/s/ STEVEN G. FARBER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-82-0092 C
GARY GARCIA, Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,
Defendants.

MOTION TO CALL NEW AUTHORITY
TO THE ATTENTION OF THE COURT

COMES NOW Martin E. Vigil, Defendant in the above-entitled cause, by and through his attorney, John W. Cassell, Assistant Legal Advisor to the New Mexico State Police and Special Assistant Attorney General of the State of New Mexico, and respectfully calls to the attention of this honorable Court the DECISION ON CERTIORARI filed by the New Mexico Supreme Court on February 22, 1982 in the case of *DeVargas v. State*, No. 13,965 (1982).

The case presents the question of which statute of limitations applies in New Mexico to causes of action brought pursuant to 42 U.S.C. §1983 for deprivation of constitutional rights alleged to be caused by law enforcement officers.

It is respectfully requested that this honorable Court consider this decision (copy attached) in ruling on Defendant Martin E. Vigil's MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED now pending before the Court in the above-captioned matter. It is further requested that the attached copy of this new authority be considered in lieu of a memorandum of points and authorities as required by Rule 9, Rules of the United States District Court for the District of New Mexico.

If is affirmatively stated, pursuant to Rule 9b, Rules of the United States District Court for the District of New Mexico, that opposing counsel was not contacted as it is believed, in view of the nature of this authority, that he would not concur.

THEREFORE, Defendant Martin E. Vigil prays that the relief requested herein be granted, and such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ JOHN W. CASSELL
Special Assistant Attorney General
Assistant Legal Advisor
New Mexico State Police
P. O. Box 1628
Santa Fe, New Mexico 87501
(505) 827-5141

I hereby certify that a true
and correct copy of this
document and the attached
DECISION ON CERTIORARI
was mailed to all counsel of
record on this 24th day of
February, 1982.

/s/ JOHN W. CASSELL

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

NO. 13,965

ANTONIO "IKE" DeVARGAS,
Plaintiff-Petitioner,

vs.

STATE OF NEW MEXICO, ex rel.
NEW MEXICO DEPARTMENT OF
CORRECTIONS, CLYDE O. MALLEY,
EDWIN T. MAHR, MICHAEL HANRAHAN,
JOHN DOES 1 through 10,
Defendants-Respondents.

DECISION ON CERTIORARI

(Filed February 22, 1982)

FEDERICI, Justice.

The opinion of the Court of Appeals was filed on October 1, 1981. A petition for writ of certiorari was filed in this Court on November 9, 1981. Thereafter, the petition for writ of certiorari was granted on November 20, 1981.

After an exhaustive review of the transcripts, briefs and authorities, it is the decision of this Court that the petition for writ of certiorari heretofore granted be quashed as improvidently issued.

Under Section 42 U.S.C. § 1983, the statute of limitations applicable is that which applies to the most closely analogous cause of action under state law.

In *Board of Regents v. Tomanio,* 446 U.S. 478 (1980), the Supreme Court of the United States clearly stated that lower federal courts must look to and apply the state statute of limitations governing the state cause of action provided by state law which is most closely analogous to

Section 42 U.S.C. § 1983 and which is not inconsistent with the Constitution and Laws of the United States.

Under New Mexico law, the most closely analogous state cause of action is provided for by the New Mexico Tort Claims Act under Section 41-4-12, N.M.S.A. 1978. The statute of limitations applicable to a cause of action under Section 41-4-12 is set forth in Section 41-4-15, N.M.S.A. 1978. Under Section 41-4-15, the action must be commenced within two years after the occurrence which results in the injury.

The original complaint failed to state a claim upon which relief could be granted. *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979). The amendment to the complaint which was filed after the two-year statute of limititations had run did not relate back to the original filing since the original complaint did not state a cause of action. N.M.R. Civ. P. 15(c), N.M.S.A. 1978

IT IS SO ORDERED.

/s/ WILLIAM R. FEDERICI, Justice

WE CONCUR:

/s/ MACK EASLEY, Chief Justice
/s/ H. VERN PAYNE, Justice
/s/ WILLIAM RIORDAN, Justice
/s/ DAN SOSA, JR., Senior Justice, not participating.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 82-0092(C)

GARY GARCIA, Plaintiff,

vs.

RICHARD WILSON, Individually,
and MARTIN VIGIL, Individually,
Defendants.

MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED
(Filed February 26, 1982)

Defendant Richard Wilson, by and through his attorneys Rodey, Dickason, Sloan, Akin & Robb, P.A., moves the Court for an Order dismissing Plaintiff's Complaint. As grounds for the Motion, Defendant states:

1. That the applicable Statute of Limititations governing causes of action brought pursuant to 42 USC §1983, as alleged in Plaintiff's Complaint, is the two year Statute of Limitations provided in §41-4-15A N.M.S.A. 1978.

2. That the above-styled cause was not filed within the two year limitation stated above.

3. That should this Court determine that the instant action is governed by a three Statute of Limitations, that this Court should grant leave to this Defendant, pursuant to 28 USC §1292, to take an interlocutory appeal on the issue to the United States Court of Appeals for the Tenth Circuit.

4. The grounds for this Motion are more fully stated in the Brief in Support attached hereto and made a part hereof.

Due to the nature of the Motion and since granting the Motion would result in dismissal of the action, concurrence of opposing counsel has not been sought.

WHEREFORE, Defendant requests the Court to enter an Order dismissing Plaintiff's Complaint and cause of action or, in the alternative, granting Defendant leave to take an interlocutory appeal on the issues presented herein to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.

By /s/ BEN M. ALLEN
Attorneys for Defendants
P. O. Box 1888
Albuquerque, New Mexico 87103
505/765-5900

I hereby certify that I have mailed a copy of the foregoing to opposing counsel of record this 25th day of February, 1982.

/s/ BEN M. ALLEN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 82-0092(C)

GARY GARCIA,
Plaintiff,

vs.

RICHARD WILSON, individually, and
MARTIN VIGIL, individually,
Defendants.

REPLY TO MOTION TO CALL NEW AUTHORITY TO THE ATTENTION OF THE COURT

The Plaintiff, by his counsel, responds to the Motion to Call New Authority to the Attention of the Court as follows:

1. The decision of the New Mexico Supreme Court in *Antonio "Ike" Devargas v. State of New Mexico, et al.*, Supreme Court No. 13,965 is called a *Decision on Certiorari* and is not authority or precedent.

2. A Decision on Certiorari is not a formal opinion of the Supreme Court of New Mexico and is not published. Rule 7, Supreme Court Miscellaneous Rules, Judicial Pamphlet No. 9, 1980 Cum.Supp.

3. Rule 7 reads as follows:

Rule 7. Opinions in civil cases.

(a) In civil cases it is unnecessary for the court to write formal opinions in every case. Disposition by order or memorandum opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are involved.

(b) When the court determines that one or more of the following circumstances exists and is dispositive of the case, it may dispose of the case by order or memorandum opinion: (1) the issues presented have been previously decided by the supreme court or court of appeals; (2) the presence or absence of substantial evidence disposes of the issue; (3) the issues are answered by statute or rules of court; (4) the asserted error is not prejudicial to the complaining party; (5) the issues presented are manifestly without merit.

(c) All formal opinions shall be published. An order or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be cited as precedent. [Adopted, effective April 26, 1979.]

4. As can be seen from the Affidavit of Rose Marie Alderete, Clerk of the New Mexico Supreme Court, the Decision on Certiorari, filed on February 22, 1982, in *Devargas v. State,* supra, is not a formal opinion of the Supreme Court and will be neither published nor reported. A copy of the Affidavit of Rose Marie Alderete is attached hereto, marked Exhibit "A", and incorporated herein by reference.

5. Pursuant to Miscellaneous Rule 7(c), the Decision on Certiorari in *Devargas v. State,* supra, because it "is unreported and not uniformly available to all parties, shall not be cited as precedent."

6. The only reported New Mexico decision that discusses the statute of limitations question presented by this case is the decision of the New Mexico Court of Appeals in *DeVargas v. State,* — N.M. —, Ct. App. No. 5062 (1981), which specifically does not address the appropriate statute of limitations.

7. As stated previously, the only reported precedent for the appropriate statute of limitations is *Hansbury v. Regents of the University of California,* 596 F.2d 944 (10th Cir., 1979) and *Gunther v. Miller,* 498 F.Supp. 882 (D. N.M., 1980).

Respectfully submitted,

/s/ STEVEN G. FARBER

208 Griffin Street
P. O. Box 2473
Santa Fe, New Mexico 87501
505/988-9725

ATTORNEY FOR PLAINTIFF

I hereby certify that
I mailed a copy of the
above Reply to opposing
counsel of record, this
4th day of March, 1982,
by first class mail, postage prepaid.

/s/ STEVEN G. FARBER

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 82-0092 C

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,

Defendants.

AFFIDAVIT OF ROSE MARIE ALDERETE

ROSE MARIE ALDERETE, being duly sworn, does hereby depose and state that:

1. I am the Clerk of the Supreme Court of New Mexico;

2. The Decision on Certiorari filed on February 22, 1982 in the case of *DeVargas v. State of New Mexico*, et al., Supreme Court No. 13,965 is not a formal opinion of the Supreme Court of New Mexico and will not be reported or published.

/s/ ROSE MARIE ALDERETE

SEAL:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 82-0092(C)

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,

Defendants,

RESPONSE TO MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED FILED BY DEFENDANT WILSON

The Plaintiff, by his counsel, moves this Court to deny the Motion on the grounds that it is not well taken:

1. The grounds for this response are identical to those stated in a similar Response to the Motion to Dismiss filed by Defendant Vigil.

2. In order to prevent needless repetition of arguments already stated on behalf of Plaintiff, the Plaintiff hereby incorporates the arguments stated in all Briefs filed herein on behalf of the Plaintiff.

Respectfully submitted,

/s/ STEVEN G. FARBER
208 Griffin Street
P. O. Box 2473
Santa Fe, New Mexico 87501
505/988-9725

ATTORNEY FOR PLAINTIFF,
GARY GARCIA

I hereby certify that I mailed a copy of the above Response to opposing counsel of record, this 4th day of March, 1982, by first class mail, postage prepaid.

/s/ STEVEN G. FARBER

RESPONDENT'S

BRIEF

No. 83-2146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD WILSON and MARTIN VIGIL,
Petitioners,

v.

GARY GARCIA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT

STEVEN G. FARVER
411 Hillside Avenue
P.O. Box 2473
Santa Fe, New Mexico 87504
505/988-9725
COUNSEL OF RECORD

RICHARD ROSENSTOCK
P.O. Box 186
Chama, New Mexico 87520
505/756-2517
COUNSEL FOR RESPONDENT

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the statutory provisions reproduced in Appendix C to the Petition for Writ of Certiorari (Pet. Cert. App. 46-48), and in Appendix A to the Brief in Opposition (Brief Op. 1-4), the following statutory provisions are relevant to the consideration of this matter: Section 3 of the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27; Section 1 of the Civil Rights Act of April 20, 1871, C. 22, 17 Stat. 13; and Section 722 of the Revised Statutes. These Provisions are reproduced in Appendix A to this Brief.

STATEMENT OF THE CASE

The Respondent, Gary Garcia (hereinafter "Plaintiff"), filed a lawsuit, in the United States District Court for the District of New Mexico, under 42 U.S.C. § 1983 against Petitioners Richard Wilson, former New Mexico State Police Officer, and Martin Vigil, former Chief of the New Mexico State Police (hereinafter "Defendants"), in their individual capacities. Plaintiff seeks money damages to compensate him for the deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and for the severe personal injuries he suffered as a result of the acts and omissions of the Defendants acting under color of law (J.A. 4-9). The Complaint specifically alleges that Defendant Wilson unlawfully and "brutally and viciously" beat Plaintiff with a "slapper," and thereafter sprayed tear gas in Plaintiff's face (J.A. 4-6). The Complaint also alleges that Defendant Vigil improperly allowed Defendant Wilson to be hired as a New Mexico State Police Officer because, prior to his employment with the New Mexico State Police, Defendant Wilson had been convicted of a variety of serious criminal offenses in several states, and there were arrest warrants outstanding against Defendant Wilson in the states of Minnesota and North Dakota and that these facts were known by, or should have been known by, Defendant Vigil (J.A. 6-8). The Complaint further alleges that, prior to Defendant Wilson's

employment with the New Mexico State Police, Defendant Vigil had received information that Defendant Wilson had been fired for stealing from a former employer, and that Defendant Vigil had been advised by two high-ranking New Mexico State Police Officers, who had investigated Defendant Wilson's employment application with the New Mexico State Police, that Defendant Vigil should not hire Defendant Wilson as a New Mexico State Police Officer (J.A. 7-8). The Complaint alleges that the conduct of Defendant Vigil, in allowing Defendant Wilson to be hired as a New Mexico State Police Officer, directly caused the injuries and violations of the civil rights suffered by the Plaintiff (J.A. 8-9).

The Complaint also alleges that Defendant Vigil failed to properly and adequately discipline, train and control Defendant Wilson, thereby directly causing the injuries and violations of civil rights suffered by the Plaintiff (J.A. 7-8).

The incident in question in this case took place on April 27, 1979 (J.A. 5). In the Complaint it is alleged that the incident of April 27, 1979, involving Plaintiff and Defendant Wilson, occurred just four days after Defendant Wilson viciously assaulted two women, and several months after Defendant Wilson had physically abused another citizen, and that Defendant Vigil was placed on notice of the violent propensities of Defendant Wilson (J.A. 6). The Complaint further alleges that Defendant Vigil did not suspend, or take disciplinary, or any other action, against Defendant Wilson (J.A. 6-7).

This lawsuit was timely filed on January 28, 1982 (J.A. 4), pursuant to *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980) and *Hansbury* v. *Regents of the University of California*, 596 F.2d 944 (10th Cir. 1979). The Defendants filed a Motion to Dismiss claiming that the statute of limitations contained in the New Mexico Tort Claims Act, N.M.Stat.Ann., § 41-4-15(A) (1978) (hereinafter "NMTCA") barred the filing of Plaintiff's Complaint (J.A. 10, 17).

Approximately one month after the filing of the Complaint, the New Mexico Supreme Court entered its decision quashing

certiorari in *DeVargas* v. *State of New Mexico*, 97 N.M. 563, 642 P.2d 166 (1982) (J.A. 15) and, without analysis or characterization of the claim, erroneously stated that the NMTCA two-year statute of limitations should apply to § 1983 actions (J.A. 16). On July 21, 1982, the Honorable Howard Bratton, Chief Judge, filed his Opinion and Order denying the Motions to Dismiss and holding that a § 1983 action is an action based on a statute and that the appropriate New Mexico statute of limitations for § 1983 actions was the four-year general statute of limitations contained in N.M.Stat.Ann. § 37-1-4 (1978). *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980) (Pet. Cert. App. 43-44). Chief Judge Bratton then entered his Order certifying an immediate interlocutory appeal on the statute of limitations issue to the United States Court of Appeals for the Tenth Circuit, pursuant to 28 U.S.C. § 1292(b) (Pet. Cert. App. 45). On January 6, 1983, the Tenth Circuit granted Defendants permission to appeal from Chief Judge Bratton's Order on the statute of limitations issue (J.A. 2).

The cause was argued and submitted to a three-judge panel on March 7, 1983. The submission Order was vacated on May 23, 1983, and on the Court's own motion, the appeal was submitted to the full Court for an *en banc* determination. Thereafter, the Tenth Circuit posed a series of questions to counsel in a number of pending cases from the several states within the Circuit seeking supplemental briefs regarding the criteria for selection of the appropriate state statute of limitations to be applied to cases brought under 42 U.S.C. § 1983 (*See* footnote 12, *infra*). Oral argument was held before the Court *en banc* on October 11, 1983.

On March 30, 1984, the Tenth Circuit, sitting *en banc*, issued its Opinion and Order of Judgment. *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984) (J.A. 2-3). In its Opinion, the Court determined that, in the Tenth Circuit, henceforth, all § 1983 claims will be uniformly characterized for statute of limitations purposes as "an action for injury to personal rights" rather than in terms of the specific facts generating a particular suit (Pet. Cert. App. 25-26). 731 F.2d 640, 651 (10th Cir. 1984). The

Court then decided that the most appropriate New Mexico limitations period to be applied to the Plaintiff's § 1983 action is that found in N.M.Stat.Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years." (Pet. Cert. App. 26-27). 731 F.2d at 651. The Court determined that the Complaint in this case was timely filed. A Petition for Writ of Certiorari was filed on June 28, 1984. This Court granted Certiorari on October 1, 1984.

SUMMARY OF THE ARGUMENT

I. The application of the New Mexico Tort Claims Act (NMTCA) limitations period, N.M. Stat.Ann. § 41-4-15 (1978), to § 1983 actions is inconsistent with the Constitution and laws of the United States. The Tenth Circuit properly ruled that § 1983 actions are best characterized as actions for injuries to personal rights. The characterization of § 1983 actions for the vindication of federal rights is a matter of federal law. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966). Federal law provides no limitations period for actions brought under 42 U.S.C. § 1983. The law requires that once the essential nature of the federal claim has been characterized as a matter of federal law, then the most appropriate, or analogous, state limitations period be applied to the federal claim based upon the federal characterization. 42 U.S.C. § 1988; *Burnett* v. *Grattan*, ___ U.S. ___, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980).

The Tenth Circuit determined that the most analogous cause of action, or appropriate New Mexico limitations period to be applied to § 1983 actions, is found in N.M.Stat.Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years." Since the Complaint in this case was filed within three years, the Tenth Circuit held that the Complaint was timely filed.

Inconsistency, confusion and chaos have developed in the federal Courts because of the attempts by the Courts to frag-

ment the single cause of action created by Congress in accordance with analogies drawn to rights created by state law. The legislative history of the Reconstruction-era Civil Rights Acts confirms the propriety of uniformly characterizing all § 1983 claims as "injuries to personal rights" for state limitation period classification, because civil rights were perceived, during the debates, as being ". . . natural rights of man" and ". . . the great fundamental rights which belong to all men." This approach to the characterization of a § 1983 action will not lead to nationwide uniformity. *Robertson* v. *Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978).

> Rather, the limitations statutes in each state will be reviewed to determine which particular state statute is most applicable to actions for injuries to personal rights. The resulting period of limitations will thus vary from state to state depending upon state law. *Within* each state, however, the most appropriate statute of limitations will be applied to all § 1983 claims brought within that state.
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> *Garcia* v. *Wilson*, 731 F.2d 640, 651 n.4 (10th Cir. 1984)

The adoption of this characterization method promotes state policies of settled expectations and repose, and discourages all this voluminous litigation on statute of limitations issues that is collateral to the merits and which consumes scarce judicial resources.

II. The New Mexico Tort Claims Act (NMTCA) is not the most appropriate or closely analogous New Mexico cause of action to a § 1983 action. The NMTCA does not create the identical cause of action as § 1983, nor does the NMTCA expressly refer to § 1983 actions. The structure of the NMTCA frustrates the remedial and deterrent purposes of a § 1983 Action. In New Mexico, the Legislature distinguishes a tort from a Constitutional violation. *Wells* v. *County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982). The DeVargas decision relied upon by the Defendants is totally inconsistent with *Wells* v. *County of Valencia*, *supra*. The NMTCA limitations period, N.M.Stat.Ann. § 41-4-15 (1978), which is unambiguous and which refers exclusively to torts, should not be applied to

§ 1983 actions, for no intent to include § 1983 actions within the meaning of the term "tort" in the NMTCA can be fairly read into the NMTCA limitations provision as it now stands. The *DeVargas* decision, applying the NMTCA limitations provision, discriminates against the federal cause of action and creates arbitrary results that are inconsistant with the Constitution and laws of the United States. The judgment of the Court below should be affirmed. An acceptance of the Defendants' position will continue to lead to needless collateral litigation on these limitations issues caused by the confusion and inconsistency which result from reference to state law analogies.

III. If this Court should, nevertheless, determine that the NMTCA limitations period applies to § 1983 actions, then any such ruling should be applied prospectively so as to not bar the action of the Plaintiff because the Plaintiff relied on federal precedent in filing this action. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

ARGUMENT

I. The Court Of Apppeals Properly Characterized 42 U.S.C. § 1983 Actions As Actions For Injuries To Personal Rights And Applied The New Mexico Personal Injury Statute Of Limitations To This Case And Found That This Action Was Timely Filed.

The Civil Rights Act of 1871, codified in part in 42 U.S.C. § 1983 (1976)[1] does not contain a statute of limitations. In

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[1] Section 1983 provides in pertinent part:

§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Burnett v. *Grattan*, ___ U.S. ___, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984), this Court set forth the process that federal Courts utilize in determining the rule of decision to be applied to actions brought under the Reconstruction-era Civil Rights Acts when the statutes do not contain an applicable rule. This Court noted that Congress has directed federal Courts to look to state law in civil rights cases when federal law is deficient and the state law "is not inconsistent with the Constitution and laws of the United States." *See* 42 U.S.C. § 1988 (1976).[2] *Burnett* v. *Grattan* described a three-step process which Congress has directed federal Courts to follow when necessary to borrow an appropriate rule from state law.

> First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] [42 U.S.C. § 1988] into effect.'. . . If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. Ibid. A third step asserts the predominance of the federal interest; courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' Ibid.

___ U.S. at ___, 104 S.Ct. at 2928-29, 82 L.Ed.2d at 43-44.

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[2] Section 1988 provides in pertinent part:

§ 1988. Proceedings in vindication of civil rights; . . . .

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ."

In this case, the Tenth Circuit *(en banc)* applied the directions of Congress and this Court to determine "the state law of limitations governing an analogous cause of action." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-484, 100 S.Ct. 1790, 1794-95, 64 L.Ed.2d 440 (1980); to " 'adopt the local law of limitation,' " *Runyon* v. *McCrary*, 427 U.S. 160, 180, 96 S.Ct. 2586, 2599, 49 L.Ed.2d 415 (1976); and to apply "the most appropriate one provided by state law." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975).[3] First, the Court of Appeals characterized the essential nature of this federal action "as being an action for injury to personal rights,"[4] recognizing that the characterization of this federal claim is a matter of federal law. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 706, 86 S.Ct. 1107, 1113, 16 L.Ed.2d 192 (1966); *Pauk* v. *Board of Trustees*, 654 F.2d 856, 865-66 and n.6 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *Zuniga* v. *Amfac Foods, Inc.*, 580 F.2d 380, 383 (10th Cir. 1978); *Williams* v. *Walsh*, 558 F.2d 667, 672 (2d Cir. 1977). Next, the Court of Appeals looked to New Mexico law and determined that the appropriate limitations period for injuries to personal rights in New Mexico is that found in N.M.Stat.Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years." The Complaint in this case having been filed within three years from the date of the injury, the Court found that the Plaintiff's suit was timely filed. 731 F.2d at 651.

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[3] Although the opinion of the Court below in *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984) *(en banc)* preceded this Court's opinion in *Burnett* v. *Grattan*, ___ U.S. ___, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984), from the following analysis it can be clearly seen that the process the Tenth Circuit *(en banc)* followed substantially mirrors the borrowing process specified in *Burnett* v. *Grattan*.

[4] *Garcia* v. *Wilson*, 731 F.2d at 650-51.

A. The Characterization Of A § 1983 Action Is A Matter Of Federal Law, And Based Upon The Federal Characterization Of The Essential Nature Of This Federal Claim, The Court Of Appeals Looked To The Law Of New Mexico And Selected The Most Appropriate And Analogous New Mexico Limitations Period, And Determined That This § 1983 Action Was Timely Filed.

The Court's characterization of § 1983 civil rights actions as being in essence "actions for injury to personal rights" is correct, and is supported by the legislative history of the Reconstruction-era Civil Rights Acts, and the prior decisions of this Court. *See infra*, Point I-C. The federal characterization process engaged in by the Court of Appeals follows the first step of the *Burnett* v. *Grattan* analysis, which is "to look to the laws of the United States so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." ___ U.S. at ___, 104 S.Ct. at 2928-29, 82 L.Ed.2d at 43-44. The laws of the United States contain the substantive content for this characterization process.

The second step of the *Burnett* v. *Grattan* analysis comes into play after the essential nature of the federal action has been characterized according to federal law. Since § 1983 does not contain a limitations period, it is at that point the federal Court, based upon the Court's characterization of the federal claim as a matter of federal law, turns to state law to borrow the appropriate state limitations period to be applied to actions brought under § 1983. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 706, 86 S.Ct. 1107, 1113, 16 L.Ed.2d 192 (1966); *Garcia* v. *Wilson*, 731 F.2d 640, 642 (10th Cir. 1984); *Knoll* v. *Springfield Township School District*, 699 F.2d 137, 140 (3d Cir. 1983); *Braden* v. *Texas A & M University System*, 636 F.2d 90, 92 (5th Cir. 1981); *Burns* v. *Sullivan*, 619 F.2d 99, 105 (1st Cir.), *cert. denied*, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980). As the Court of Appeals noted, "[a]lthough the federal courts are bound by the state's construction of its own statute of limitations, it is a question of federal law whether a particular statute, as construed by the state, is applicable to a

federal claim." *Garcia* v. *Wilson*, 731 F.2d at 642-643; *Pauk* v. *Board of Trustees*, 654 F.2d at 866, n.6 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982). Federal Courts have historically engaged in the process of characterizing a federally-created claim as a matter of federal law to determine the nature of the claim and then applying the appropriate state limitations period based upon the federal characterization of the claim.[5]

Since no federal limitations rule exists for § 1983 actions, *O'Sullivan* v. *Felix*, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914), the Court of Appeals properly undertook the second

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[5] *See McNutt* v. *Duke Precision Dental & Orthodontic Lab.*, 698 F.2d 676, 679 (4th Cir. 1983); *Clark* v. *Musick*, 623 F.2d 89, 91 (9th Cir. 1980) *(per curiam); Van Horn* v. *Lukhard*, 392 F.Supp. 384, 388-391 (E.D. Vir. 1975); *Smith* v. *Cremins*, 308 F.2d 187, 189 (9th Cir. 1962) (civil rights action) ("In determining which period of limitations to apply to an action under a particular federal statute, the federal court accepts the state's interpretations of its own statute of limitations (footnote omitted), but determines for itself the nature of the right conferred by the federal statute." (footnote omitted)); *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F.2d 80, 83 (2d Cir. 1961) (anti-trust action) ("Thus, when a state has established different periods of limitations for different types of actions, a federal Court enforcing a federally created claim looks first to federal law to determine the nature of the claim and then to state court interpretations of the statutory catalogue to see where the claim fits into the state scheme") citing *McClaine* v. *Rankin*, 197 U.S. 154, 25 S.Ct. 410, 49 L.Ed. 702 (1905); *McClaine* v. *Rankin, supra* (National Bank Act Assessment action) (the Court characterized the federal action as being "enforceable only according to the federal statute" and therefore looked to the appropriate state limitations period for a limitations period covering a liabilty based upon statute and finding none, the Court applied the state residuary limitations period). 197 U.S. at 162-63, 25 S.Ct. at 412-13. *See also Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906), *affirming City of Atlanta* v. *Chattanooga Foundry and Pipe Works*, 127 Fed.Rep. 23, 32 (6th Cir. 1903) (antitrust action characterized by the federal Court as "action on a statute liability," state residuary limitations period applied).

and third steps [of the *Burnett* v. *Grattan* process] "by considering application of State common law, as modified and changed by the constitution and statutes of the forum state," and asserting the predominance of the federal interest in determining the limitations period to be applied in this case. *Burnett* v. *Grattan*, ____ U.S. at ____, 104 S.Ct. at 2929, 82 L.Ed.2d at 43. The Tenth Circuit was obviously mindful of the admonition that ". . . [t]he cases also establish that the silence of Congress is not to be read as automatically putting an imprimatur on state law. Rather, state law is applied only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires. [Citations omitted.] *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 709, 86 S.Ct. 1107, 1115, 16 L.Ed.2d 192 (1966) (White, J., dissenting). Federal policy requires that the essential nature of a federal civil rights action be characterized as a matter of federal law.

The Tenth Circuit noted that the elements of a § 1983 claim are the deprivation of rights secured by the Constitution and federal law, and action occurring under color of state law, that these rights have been described as inhering "in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eyes of the law,"[6] that "[I]n the broad sense, every cause of action under § 1983 which is well-founded results from personal injuries,"[7] and that "[T]he cause of action is in essence delictual."[8] The Tenth Circuit concluded that every § 1983 claim is in essence an action for injury to personal rights. 731 F.2d at 650. The Tenth Circuit then looked to the law of the forum state—New Mexico—and, based upon the federal characterization of the claim, determined that the appropriate New Mexico limitations period for injuries to person-

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[6] *Walden, III, Inc.* v. *Rhode Island*, 576 F.2d 945, 946 (1st Cir. 1978) quoting *Commerce Oil Refining Corp.* v. *Miner*, 98 R.I. 14, 199 A.2d 606 (1964).

[7] *Almond* v. *Kent*, 459 F.2d 200, 204 (4th Cir. 1972).

[8] *Braden* v. *Texas A & M University System*, 636 F.2d 90, 92 (5th Cir. 1981).

al rights, for borrowing purposes, is that found in N.M.Stat. Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for injuries to the person or reputation of any person within three years." (Pet. Cert. App. 26-27.) 731 F.2d at 651.

The Court of Appeals thus correctly decided that the Plaintiff's lawsuit was timely filed. *Garcia* v. *Wilson*, 731 F.2d 640, 651 (10th Cir. 1984) *(en banc)*. In applying the New Mexico personal injury statute, N.M.Stat.Ann. § 37-1-8 (1978), and not the New Mexico Tort Claims Act limitation period, N.M.Stat.Ann. § 41-4-15 (1978) urged by the Defendants, the Court of Appeals implicitly recognized that "[T]o the extent that particular state concerns are inconsistent with, or of marginal relevance to, the policies informing the Civil Rights Acts, the resulting state statute of limitations may be inappropriate for civil rights claims." *See Burnett* v. *Grattan*, ___ U.S. at ___, and n.15, 104 S.Ct. at 2931, and n.15, 82 L.Ed.2d at 46, and n.15. *See infra* at Point II.

B. The Court Of Appeals' Decision To Uniformly Characterize All § 1983 Actions As Being Actions For Injuries To Personal Rights Is Correct And Essential Because The Approach Urged By The Defendants Has Caused Inconsistency, Confusion, And Needless Collateral Litigation In The Federal Courts.

The Tenth Circuit, in characterizing the civil rights claims in this case as being "in essence an action for injury to personal rights," 731 F.2d at 650, also decided that "[H]enceforth, all § 1983 claims in the Tenth Circuit will be uniformly so characterized for statute of limitations purposes." This uniform characterization approach within the Circuit is essential because of the incredible difficulty, inconsistency, and confusion that has evolved in the determination of selecting "appropriate" or "closely analogous" state statutes of limitations to be applied to civil rights actions. These problems are primarily caused by the underlying conduct analysis advocated by the Defendants. The Court of Appeals has rejected this approach

as unreasonable and unworkable. 731 F.2d at 648-651.[9] The Court of Appeals noted that its decision to uniformly characterize the nature of the federal civil rights claim was not inconsistent with this Court's concern regarding imposing nationwide uniformity in the selection of limitations periods for § 1983 actions in the absence of Congressional action. The Tenth Circuit recognized that ". . . reliance on state law obviously means that there will not be nationwide uniformity on these issues." *Board of Regents* v. *Tomanio*, 446 U.S. at 489, 100 S.Ct. at 1797, (quoting *Robertson* v. *Wegmann*, 436 U.S. 584, 594 n.11, 98 S.Ct. 1991, 1997 n.11, 56 L.Ed.2d 554 (1978)), but added that:

> We do not read this statement as contrary to our determination that uniformity in the characterization of federal civil rights claims is a commendable goal. Uniformity of characterization will not result in one limitations period being applied to all civil rights cases regardless of the state in which they arose. Rather, the limitations statutes in each state will be reviewed to determine which particular state statute is most applicable to actions for injuries to personal rights. The resulting period of limitations will thus vary from state to state, depending on state law. *Within* each state, however, the most appropri-

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[9] Practically every commentator who has studied the problem has criticized the lack of unity of the Courts in finding a consistent method for borrowing state statutes of limitations in federal civil rights actions and, in particular, the analytical approach advanced by the Defendants. These articles include collections of the hundreds of conflicting opinions on this issue. *See e.g.*, 2 *Civil Rights Actions* 4-1, *et seq.*, Cook and Sobieski (1984); Jarmie, *Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Acts Claims: The Tenth Circuit's Resolution*, 15 N.M.L.Rev. ___ (1984); Note, *A Call for Uniformity: Statutes of Limitations in Federal Civil Rights Actions*, 26 Wayne L.Rev. 61 (1979); Comment, *Statutory Time Limitations on Back Pay Recovery in Section 1981 and 1983 Employment Discrimination Suits*, 29 Emory L.J. 437, 445 (1980); Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 Ariz. St.L.J. 97; Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 Columbia L.Rev. 763 (1968).

> ate statute of limitations will be applied to all § 1983 claims brought within that state. Other circuits have agreed with us that the interest in attaining this limited uniformity is an important one. *See Pauk* v. *Board of Trustees*, 654 F.2d 856, 862 (2d Cir. 1981); *Walden, III, Inc.* v. *Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978); *Beard* v. *Robinson*, 563 F.2d 331, 337 (7th Cir. 1977); *Smith* v. *Cremins*, 308 F.2d 187, 190 (9th Cir. 1962).
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> 631 F.2d at 651, n.4

A consistent federal characterization of the essential nature of a federal civil rights action brought pursuant to § 1983 as being an action for injury to personal rights[10] is warranted by § 1988. If there is federal law "adapted to the object" of the civil rights laws, § 1988 commands that the federal courts apply that law in § 1983 actions. *See Chardon* v. *Fumero Soto*, ___ U.S. ___, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983); *Robertson* v. *Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). The Tenth Circuit's decision to uniformly characterize civil rights claims as injuries to personal rights and then look to the individual state limitations period that applies to such an injury is consistent with the legislative history of the Reconstruction-Era Civil Rights statutes. *See infra*, Point I-C. It also results in a firmly defined and easily applied rule. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Chardon* v. *Fumero Soto*, ___ U.S. at ___, 103 S.Ct. at 2621, 77 L.Ed.2d at 88 (Rehnquist, J., dissenting).

All the collateral and needless litigation on these limitations period questions has taken its toll on the federal Court system.[11] For example, on the very same day *Garcia* v. *Wilson*

[10] A survey undertaken by the Plaintiff, of the various injury to personal rights or personal injury statutes of limitations of the several states of this country and the territories, shows that there is a wide diversity of limitations periods and not nationwide uniformity using the approach adopted by the Tenth Circuit. *See* Appendix, Part B.

[11] This limited uniformity in the method of characterization is certainly more judicious and consistent with the remedial nature of § 1983 than the haphazard development in the law to date in which many civil rights litigants, plaintiffs and defendants alike, have no settled expectation, or even hunch, of which limitations period will be applied to their case. *See e.g., Polite* v. *Diehl*, 507 F.2d 119 (3rd Cir. 1974) *(en banc). See also* Jarmie, *Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Acts Claims: The Tenth Circuit's Resolution*, 15 N.M.L.Rev. ___, at ___ (1984) and other authorities cited in footnote 9. Numerous Courts, as well, have criticized the lack of any kind of consistent and logical approach to this problem. *See e.g., Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984); *Garmon* v. *Foust*, 668 F.2d 400 (8th Cir.) *(en banc), cert denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied, sub nom., Mitchell* v. *Beard*, 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 1149 (1978); *Ingram* v. *Steven Robert Corp.*, 547 F.2d 1260, 1263-64 (5th Cir. 1977); *Schorle* v. *City of Greenhills*, 524 F.Supp. 821, 825 (S.D. Ohio 1981); *Gordon* v. *City of Warren*, 415 F.Supp 556, 559-561 (E.D. Mich. 1976).

[12] *See Hamilton* v. *City of Overland Park, Kansas*, 730 F.2d 613 (10th Cir. 1984) (Kansas—2 years); *Mismash* v. *Murray City*, 730 F.2d 1366 (10th Cir. 1984) (Utah—4 years); *McKay* v. *Hammock*, 730 F.2d 1367 (10th Cir. 1984) (Colorado—3 years); *Jackson* v. *City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984) (New Mexico—3 years); *Pike* v. *City of Mission, Kansas*, 731 F.2d 655 (10th Cir. 1984) (Kansas—2 years); *Abbitt* v. *Franklin*, 731 F.2d 661 (10th Cir. 1984) (Oklahoma—2 years).

[13] *See* cases collected in the authorities noted in footnotes 9 and 11. The Jarmie article, 15 N.M.L.Rev. ___ (1984) and the Cook and Sobieski text, 2 Civil Rights Actions at 4-1, *et seq.* are both exhaustive, well-documented and analyzed collections of these reported opinions. *See also* Annot., 45 A.L.R.Fed. 548 (1979) (§ 1983 actions); Annot., 29 A.L.R.Fed. 710 (1976) (§ 1981 actions).

was decided by the Tenth Circuit, that Court disposed of six other cases, all of which were pending and had raised the issue of the selection of a state statute of limitations to be applied to civil rights actions.[12] Over the past decade hundreds of conflicting Circuit Court opinions have been issued on statute of limitations questions in federal civil rights actions, and the confusion and inconsistency result primarily where the specific underlying facts and state characterization approach, strenuously urged by the Defendants, has been adopted.[13]

The Tenth Circuit *(en banc)*, in deciding to uniformly characterize all § 1983 actions within the Circuit as actions for injuries to personal rights for statute of limitations purposes, rather than in terms of the specific facts generating a particular suit, has developed an approach to the problem that is consistent with the concept of federalism, mindful of the broad remedial purposes of civil rights legislation, *Mitchum* v. *Foster*, 407 U.S. 225, 238-242, 92 S.Ct. 2151, 2160-62, 32 L.Ed.2d 705 (1972); *United States* v. *Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), and cognizant of the importance of the policies of certainty and repose embodied in state statutes of limitations. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487-89, 100 S.Ct. 1790, 1796-97, 64 L.Ed.2d 440 (1980); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946); *Campbell* v. *Haverhill*, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1985). The Tenth Circuit also weighed the history of the Civil Rights Acts in a manner that is consistent with the understanding of this Court that:

> In the Civil Rights Acts, Congress established causes of action arising out of rights and duties under the Constitution and federal statutes. These causes of action exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance. The statutes are characterized by broadly inclusive language. They do not limit who may bring suit, do not limit the cause of action to a circumscribed set of facts, nor do they preclude money damages or injunctive relief. An appropriate limitations period must be responsive to these characteristics of litigation under the federal statutes. *A state law is not 'appropriate' if it fails to take into account* practicalities that are involved in litigating federal civil rights claims and *policies that are analogous to the goals of the Civil Rights Acts.*
>
> *Burnett* v. *Grattan*, ____ U.S. at ____, 104 S.Ct. at 2930, 82 L.Ed.2d at 44-45. [Emphasis added.]

The decision in *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984) is based on law, logic, and reason and will further the administration of justice in the federal Courts by avoiding the volumi-

nous litigation caused by the uncertainty of state law characterization and analogies.

C. The Decision To Uniformly Characterize All § 1983 Actions As Being Actions For Injuries To Personal Rights Is Confirmed By The Legislative History Of The Reconstruction-Era Civil Rights Acts.

The method of characterization of federal civil rights claims employed by the Tenth Circuit in *Garcia* v. *Wilson* is supported by the legislative history of the Reconstruction-era Civil Rights Acts. The Tenth Circuit concluded that the rights secured by the Constitution and federal law inhere "in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eye of the law," and that "[I]n the broad sense, every cause of action under § 1983 which is well founded results from personal injuries," and "[T]hat the cause of action for the deprivation of these rights is in essence 'delictual.' " 731 F.2d at 650.

This view is fully confirmed by the legislative history of the Reconstruction-era Civil Rights Acts. § 1988 was first enacted as a portion of § 3 of the Civil Rights Act of April 9, 1866, Ch. 31, 14 Stat. 27. Section 1 of that Act is the historical source of 42 U.S.C. §§ 1981 and 1982. *Runyon* v. *McCrary*, 427 U.S. 160, 168-169, n.8, 96 S.Ct. 2586, 2593-94, n.8, 49 L.Ed.2d 415 (1976). Section 2 of the Civil Rights Act of 1866 was the model for Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983. *Mitchum* v. *Foster*, 407 U.S. 225, 238, n.27, 92 S.Ct. 2151, 2160, n.27, 32 L.Ed.2d 705 (1972).[14] The initial portion of § 3 of the Civil Rights Act of 1866 established federal jurisdiction to hear, *inter alia*, civil actions brought to enforce

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[14] For the initial reading in the Senate by Senator Trumbull of Senate Bill No. 61, to protect all persons in the United States in their civil rights, and furnish the means of their vindication, *see* Cong. Globe, 39th Cong., 1st Sess. 211 (1866). *See also* veto message of President Andrew Johnson, Cong. Globe, 39th Cong., 1st Sess. 1679-1681 (1866); veto override of the Senate and the House, Cong. Globe, 39th Cong., 1st Sess. 1809, 1861 (1866).

§ 1 of the Act. "Section 3 then went on to provide that the jurisdiction thereby established should be exercised in conformity with federal law where suitable and with reference to the common law, as modified by state law, where federal law is deficient. [Footnote omitted.] Considered in context, this latter portion of § 3, which has become § 1988 and has been made applicable to the Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act, including § 1." *Moor* v. *County of Alameda*, 411 U.S. 693, 705, 93 S.Ct. 1785, 1793-94, 36 L.Ed.2d 596 (1973). 14 Stat. 27.[15]

During the Congressional debates on the Civil Rights Act of of 1866, there was considerable concern amongst certain legislators that the Thirteenth Amendment did not supply the Constitutional power to support the passage of the Act. Thereafter, following the proposal of the Fourteenth Amendment in 1866, Cong. Globe, 39th Cong., 1st Sess. 2286, 3042 (1866) and the ratification of the Fourteenth Amendment in 1868, 15 Stat. 708 (1868) (ratification certified by Secretary of State William Seward), the Civil Rights Act of 1866 was re-enacted in full in the Act of May 31, 1870, c. 114, § 18, 16 Stat. 144.[16] Congress again directed merely that § 1988 would serve as a guide for Courts in the enforcement of the causes of action created by the Act of May 31, 1870. 42 U.S.C. § 1983 was first enacted as Section 1 of the Act of April 20, 1871, c. 22, 17 Stat. 13. This cause of action was made "subject to the sames rights of appeal, review upon error, and other remedies provided in like cases

[15] The pertinent portion of § 3 of the Civil Rights Act of April 9, 1866, Ch. 31, 14 Stat. 27, is reproduced in the Appendix, Part A.

[16] Section 18 of the Act of May 31, 1870 re-enacted the 1866 Act in full, by reference, and provided that §§ 16 and 17 of the Act would be enforced according to the provisions of the 1866 Act. Section 16 is the precursor of 42 U.S.C. § 1981, and § 17 is the precursor of 42 U.S.C. § 1982. Section 3 of the 1866 Act, now 42 U.S.C. § 1988, was simply incorporated by reference pursuant to § 18 of the Act of May 31, 1870, c. 114, 16 Stat. 144.

. . . under the provisions of the act of the ninth of April, eighteen hundred and sixty six. . . ."[17] Section 1988 subsequently became § 722 of the Revised Statutes and was made generally applicable to the civil rights portions of the Revised Statutes, §§ 1977-1991. *Moor* v. *County of Alameda*, 411 U.S. at 703-706, 93 S.Ct. at 1792-94, 36 L.Ed.2d at 596.

A consistent and common theme throughout this legislative process was that the federal causes of action created by the Reconstruction-era Civil Rights Acts were intended to furnish the means to vindicate the rights of the citizens. As this Court noted in *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 617-618, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (1979), ". . . Senator Edmunds recognized in the 1871 debate: 'All civil suits, as every lawyer understands, which this act authorizes, are not based upon it; they are based upon the right of the citizen. The Act only gives a remedy.' " Cong. Globe, 42nd Cong. 1st Sess. 568 (1871).

During these Reconstruction-era debates, the legislators emphasized that these new federal causes of action were designed to afford a remedy for the vindication of personal rights. There were repeated and specific references to the nature of these rights. Senator Trumbull, the sponsor of the 1866 Civil Rights Bill in the Senate (S. No. 61), explained and defined his understanding of the term civil rights:

> Mr. TRUMBULL. The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property. These I understand to be civil rights, fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in.
>
> Cong. Globe, 39th Cong., 1st Sess. 476 (1866)

[17] Section 1 of the Act of April 20, 1871, taken from The Appendix to the Congressional Globe, 42nd Cong., 1st Sess. 335, (17 Stat. 13) is reproduced in the Appendix, Part A.

Even an arch enemy of this civil rights bill, Senator Saulsbury, acknowledged and recognized this nature of a civil right. He said, "[W]hat is a civil right? It is a right that pertains to me as a citizen." Cong. Globe, 39th Cong., 1st Sess. 606 (1866). Senator Trumbull expounded at length about the nature of the fundamental rights of a citizen. Cong. Globe, 39th Cong., 1st Sess. 474-475, 599-600. His view was echoed in the House of Representatives by Rep. Wilson, the sponsor of the legislation in the House. Rep. Wilson declared:

> . . . Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as—
>
> 'The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.' 'Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits of prescribed law.'—*Kent's Commentaries*, vol. 1, p. 199.
>
> * * * *
>
> The definition given to the term 'civil rights' in Bouvier's Law Dictionary is very concise, and is supported by the best authority. It is this:
>
> 'Civil rights are those which have no relation to the establishment, support, or management of government.'
>
> From this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic.
>
> * * * *
>
> Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. *We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.* I am aware, sir, that this doctrine is denied in many of the States; but this only proves the necessity for the enactment of the remedial and protective features of this bill. If the States would all observe the rights of our citizens, there would be no need of this bill. [Emphasis added.]
>
> Cong. Globe, 39th Cong., 1st Sess. 1117 (1866)

The sponsors of the Civil Rights Act of 1866 set out their understanding of the nature of the fundamental rights of a person to personal security, personal liberty, and of personal property.[18] They did not distinguish between these rights for enforcement purposes. They did not distinguish between these rights based upon the employment status of the violators. Nor did they distinguish between these rights based upon the underlying conduct, or the specific facts which generated the violation of the rights. All of these rights were seen as ". . . the great fundamental rights which belong to all men." *Id.* at 1118.[19] The understanding of the nature of these rights carried

[18] Rep. Wilson illustrated the rights of personal security, personal liberty, and personal property, as follows: "What are these rights? Certainly they must be as comprehensive as those which belong to Englishmen. And what are they? Blackstone classifies them under three articles, as follows: 1) *The right of personal security;* which he says, 'Consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.'; 2) *the right of personal liberty;* and this, he says, 'Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment, or restraint, unless by due course of law.'; 3) *the right of personal property*, which he defines to be, 'The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.'—*Sharswood's Blackstone*, vol. 1, chap 1. In his lecture on the absolute rights of persons, Chancellor Kent (Kent's Commentaries, volume one, page 599) says: 'The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable.' " Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

[19] *See also, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (Bingham); *Id.* at 1293 (Shellabarger); *Id.* at 1294-95 (Wilson); *Id.* at 1757-60 (Trumbull); *Id.* at 1832-37 (Lawrence).

on in the 42nd Congress, during the debates which led to the passage of § 1 of the Civil Rights Act of April 20, 1871, now codified as 42 U.S.C. § 1983.[20] Moreover, it is clear that Congress specifically directed the federal Courts to enforce the Civil Rights Act by giving substance to its provisions.

Thus, the propriety of the characterization of a § 1983 civil rights claim as an action for injury to personal rights is shown by the review of the legislative history of the Reconstruction-era Civil Rights Acts. The rights themselves were seen as being unified in a person. The focus was on the injury to the person by the deprivation of these fundamental rights. These Acts provided a remedy for the enforcement of these rights. But, "[I]t remains true that one cannot go into Court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (1979). As has been demonstrated, "[t]he remedy provided by Section 1983 is statutory in origin, but the underlying liability it enforces stems primarily from the Constitution." *Garcia* v. *Wilson*, 731 F.2d at 650. A deprivation of these rights results in a personal injury, *Almond* v. *Kent*, 459 F.2d 200, 204 (4th Cir. 1972), and "[a] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe* v. *Pape*, 365 U.S. 167, 196, 81 S.Ct. 473, 488, 4 L.Ed.2d 492 (1961) (Harlan, J., concurring), *overruled on other grounds*, *Monell* v. *Dep't of Social Services*,

[20] *See e.g.*, Remarks of Senator Edmunds, Cong. Globe, 42nd Cong., 1st Sess. 567-68 (1871); *Id.* at 575-77 (Trumbull); *See also* Appendix, Cong. Globe, 42nd Cong., 1st Sess. 68-71 (1871) (Shellabarger); *Id.* at 83-86 (Bingham); *Id.* at 224-30 (Boreman), citing *Corfield* v. *Coryell*, 4 Washington's U.S. Circuit Court Reports 371, 380-381 (1823)); *Id.* at 254-57 (Wilson); *Id.* at 312-16 (Burchard). *See Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 670-71, 98 S.Ct. 2018, 2025, 56 L.Ed.2d 611 (1978).

436 U.S. 658 (1978). Based upon these principles, the Court of Appeals borrowed the most appropriate, and analogous, New Mexico limitations period, the personal injury statute, N.M.Stat.Ann. § 37-1-8 (1978), and applied it to this case.[21] Since this lawsuit was filed within three years of the occurrence of the injury, the suit was timely filed.

II. The New Mexico Tort Claims Act (NMTCA) Does Not Create An Identical Action To One Filed Under § 1983 And The NMTCA Is Not The Most Analogous Or Appropriate New Mexico Cause Of Action To Be Applied To § 1983 Because The Structure Of The NMTCA Frustrates The Policies And Purposes Of § 1983 And The Application Of The NMTCA To § 1983 Actions Is Inconsistent With The Constitution And Laws Of The United States.

The Tenth Circuit *(en banc)* properly ruled that the limitations period contained in the New Mexico Tort Claims Act (hereinafter "NMTCA") is not the controlling and appropriate New Mexico limitations period for § 1983 actions. 731 F.2d at 651, n.5.[22] The express language of the NMTCA specifically

[21] If this Court were to determine, nevertheless, that a § 1983 action is an action based upon statute, contrary to the analysis presented herein, nevertheless, the Complaint filed in this case would be timely filed. *See* Pet. Cert. App. 43-44. *See also Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980); *Pauk* v. *Board of Trustees*, 654 F.2d 856, 861-866 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *Beard* v. *Robinson*, 563 F.2d 331 (1977), *cert. denied sub nom.*, *Mitchell* v. *Beard*, 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 54 (1978); *Smith* v. *Cremins*, 308 F.2d 187 (9th Cir. 1962). *See* R. Stern and E. Gressman, *Supreme Court Practice*, 478 (5th Ed. 1978); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977) for the proposition that Respondent can advance any ground, even one rejected or not raised below, in support of the judgment in his favor.

[22] N.M. Stat.Ann., § 41-4-15 (1978), the NMTCA limitations provision, reads in pertinent part:

41-4-15. Statute of Limitations.

A. Actions against a governmental entity or a public employee *for torts* shall be forever barred, unless such action is

indicates that tort actions are separate and apart from actions for the redress of federal constitutional rights such as are available under 42 U.S.C. § 1983.[23] *Wells* v. *County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982).

The New Mexico Supreme Court, in a reasoned opinion which examined the difference between a cause of action under the NMTCA and a § 1983 action, stated that "the New Mexico Legislature recognizes that a tort is separate and distinct from a constitutional deprivation." *Wells* v. *County of Valencia*, 98 N.M. at 6, 644 P.2d at 520 (1982). The opinion in *Wells* is totally inconsistent with the prior statements of the New Mexico Courts in *DeVargas* v. *State ex rel. Dep't of Corr.*, 97 N.M. 447, 640 P.2d 1327 (Ct.App. 1981), *cert. quashed as improvidently issued, State* v. *DeVargas*, 97 N.M. 563, 642 P.2d 166 (1982), and the position asserted by the Defendants. In *Wells*, the New Mexico Supreme Court recognized the significant difference between a § 1983 cause of action and a cause of action under the NMTCA.[24]

commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability. [Emphasis supplied.]

Pet. Cert. App. 47-48

[23] Thus, the New Mexico Tort Claims Act is quite different from the Oregon Tort Claims Act discussed in *Kosikowski* v. *Bourne*, 659 F.2d 105 (9th Cir. 1981). In *Kosikowski* there was an express legislative determination to apply the Oregon Tort Claims Act two-year limitation provision to § 1983 actions. 659 F.2d at 107. Nevertheless, the Court in *Kosikowski* recognized that even an express legislative determination could frustrate the purposes served by federal law. 659 F.2d at 107. Exposing the extreme difficulty of anything other than a federal characterization of federal civil rights claims based upon federal law, the Ninth Circuit in *Kosikowski*, on rehearing, refused to apply the Oregon Tort Claims Act to actions brought pursuant to 42 U.S.C. § 1981, leaving the limitations period for § 1981 actions at six years. *Kosikowski* v. *Bourne*, 659 F.2d 105, 108 (9th Cir. 1981) *(on rehearing) (en banc)*. *Compare EEOC* v. *Gaddis*, 733 F.2d 1373, 1376-1378 (10th Cir. 1984) (§ 1981 action is in essence an action for injury to personal rights. In the same state, the limitations period for § 1981 and 1983 actions are the same).

A. The NMTCA Limitations Period, § 41-4-15, Refers Exclusively To Torts, Does Not Pertain To Actions For The Deprivation Of Constitutional Rights And Its Application To § 1983 Actions Is Inconsistent With The Constitution And Laws Of The United States.

In reaching the conclusion that § 1983 actions and NMTCA actions are separate and distinct concepts, the Court in *Wells*, and Chief Federal District Judge Bratton, in *Garcia* v. *Wilson*, (Pet. Cert. App. 38-40), analyzed basically the same provisions of the NMTCA. Chief Judge Bratton and the Court in *Wells* observed that the NMTCA specifically and consistently distinguished between torts, property rights, and constitutional deprivations.[25] The Federal District court concluded that:

[24] The New Mexico Supreme Court in *Wells* noted:

[t]he United States Supreme Court recognizes that, although a Section 1983 action can grow out of tortious conduct, the two are distinct concepts compensable under different laws. Tortious conduct which does not amount to a constitutional violation does not state a cause of action under Section 1983, but may be fully compensable under a state remedy for a tortious loss. [Citation omitted.] [Emphasis supplied.]

Wells v. *County of Valencia*, 98 N.M. 3, at 5-6; 644 P.2d 517, at 519-520.

The provisions of the NMTCA demonstrate that the New Mexico Legislature distinguished between torts and constitutional violations. *See* Kovnat, *Constitutional Torts and the New Mexico Tort Claims Act*, 13 N.M.L.Rev. 1, at 45-50 (1983).

[25] For example, "Section 41-4-4(B) of the NMTCA provides that a governmental entity or employee while acting within the scope of his or her duty be defended against a claim for any tort *or* any violation of property rights *or* any rights, privileges, or immunities secured by the Constitution of the United States. N.M.Stat.Ann. § 41-4-4(B) (Cum.Supp. 1981) (emphasis added). Similarly, N.M.Stat.Ann. § 41-4-12 (1978) waives immunity for actions against law enforcement officers acting within the scope of their duties for '[certain specified torts], violation of property rights *or* deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States . . .' (emphasis added)." (Pet. Cert. App. 38.)

The language in the NMTCA's statute of limitations provision is equally unambiguous. It provides that:

> Actions against a governmental entity or a public employee for *torts* shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death. . . .

N.M.Stat.Ann. § 41-4-15(A) (1978) (emphasis added).

Thus, the plain language of the NMTCA indicates that the Legislature did not intend the term 'tort' to include actions arising under § 1983. In construing New Mexico statutes, this Court must do so with the ultimate purpose of ascertaining and giving effect to the manifest intent of the Legislature. N.M.Stat.Ann. § 12-2-2 (1978). No intent to include § 1983 actions within the meaning of the term 'tort' in the NMTCA can be fairly read into the NMTCA as it now stands.

Garcia v. *Wilson*, Pet. Cert. App. at 38-39.

Accord, *Wells* v. *County of Valencia*, 98 N.M. at 6, 644 P.2d at 520 ("Since the Legislature distinguishes a tort from a constitutional violation, it is reasonable to presume that they recognize the existence of a Section 1983 remedy for such violations"). *Martinez* v. *The Board of Education of the Taos Municipal School District*, ___ F.2d ___, Nos. 83-1680, 1764 (10th Cir. 1984).[26]

Contrary to the assertions of the Defendants, N.M.Stat. Ann. § 41-4-12 (1978) of the NMTCA does not create the

[26] *See also Garmon* v. *Foust*, 668 F.2d 400 (8th Cir.) *(en banc)*, *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982) (tort analogy unduly cramps the significance of § 1983 as a broad, statutory remedy); *Carlson* v. *Green*, 446 U.S. 14, 20-23, 100 S.Ct. 1468, 1472-74, 64 L.Ed.2d 15 (1980) (recognizing the distinction between an action for the deprivation of constitutional rights and a Tort Claims Act remedy).

same cause of action as 42 U.S.C. § 1983.[27] Although § 41-4-12 purports to waive immunity for law enforcement officers,[28] that section of the NMTCA does not have the same breadth and scope as a § 1983 action. The essential elements of a § 1983 action are (1) the denial under color of law (2) of a right secured by the Constitution and laws of the United States. *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled on other grounds*, *Monell* v. *Dep't of Social Services*, 436 U.S. 658 (1978); *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Section 41-4-12 of the NMTCA does not provide a cause of action against a law enforcement officer who acts under color of law but outside the scope of the officer's duties. In fact, the NMTCA bars such an action by requiring the officers to act within the scope of their duties as an element that must be proven under § 41-4-12. Section 1983 provides a cause of action under these same circumstances.

[27] N.M.Stat.Ann. § 41-4-12 (1978) reads:

41-4-12. Liability; law enforcement officers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

[28] It is interesting to note that Defendant Vigil, as former Chief of the New Mexico State Police, takes the position in this Court that he is a "law enforcement officer" and therefore entitled to the benefits of the NMTCA, but in another case Defendant Vigil, as former Chief of the New Mexico State Police, takes the opposite position that he is not a law enforcement officer and, therefore, is immune from suit under the NMTCA. *Dennis Salazar, et al.* v. *David Stewart, et al.*, First Judicial District, County of Rio Arriba, State of New Mexico, No. RA 83-241(C), Defendant Martin Vigil's Motion for Summary Judgment filed June 21, 1984.

See Stengel v. *Belcher*, 522 F.2d 438 (6th Cir.), *cert. granted*, 425 U.S. 910, *cert. dismissed*, 429 U.S. 118 (1976). The fact that an officer was acting outside the scope of his duties will be a defense to a NMTCA action, but it will not defeat a § 1983 claim where the officer was acting under "color of law" and outside the course and scope of his duties. *See Cameron* v. *City of Milwaukee*, 102 Wis.2d 448, 307 N.W.2d 164 (Wisc.Sup.Ct. 1981); *Davis* v. *Murphey*, 559 F.2d 1098 (7th Cir. 1977).

The action allowed by § 41-4-12 of the NMTCA for Constitutional deprivations is very different from, and much more limited than a § 1983 action. Section 1983 serves basically two functions: it deters future governmental action that violates a person's civil rights, and it compensates the injured party. *Owen* v. *City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). There is no statutory limitation on the amount of damages an injured party can be awarded in a § 1983 action. *Burnett* v. *Grattan*, ___ U.S. at ___, 104 S.Ct. at 2930, 82 L.Ed.2d at 44-45 (1984). In addition, punitive damages are allowed to be awarded in § 1983 actions under proper circumstances. *Smith* v. *Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The NMTCA has statutory limitations on damages and does not allow the recovery of punitive damages.[29]

A further example of the derogation of rights a civil rights litigant has under the NMTCA is the requirement of notice provision contained within § 41-4-16 of the NMTCA (Brief Op. App. 1-3). This notice provision applies to the entire NMTCA, including § 41-4-12, the law enforcement officers section, and § 41-4-15(A), the two-year limitation period of the NMTCA. Section 41-4-16A requires a person claiming damages against the State or a local public body to give written notice of the claim to a specified governmental official "within ninety (90)

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[29] Section 41-4-19(A) of the NMTCA provides a limitation on damages, and only covers a public employee who has acted within the scope of his duties. Section 41-4-19(B) precludes any award of punitive damages under the NMTCA. *See* Brief Op. App. at 3-4.

days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act." Section 41-4-16B provides an absolute defense to a claim for damages under the NMTCA unless the requisite written notice has been given as required by § 41-4-16A, or unless the governmental entity had actual notice of the occurrence. Section 41-4-16C lengthens the notice period to six (6) months in a wrongful death situation.

The New Mexico Courts have interpreted this notice provision as being in the nature of a statute of limitations. *See Ferguson* v. *New Mexico State Highway Commission*, 99 N.M. 194, 656 P.2d 244 (Ct.App. 1982). Since the 90-day notice provision section applies to the entire NMTCA, the 90-day notice required by § 41-4-16A is required even for constitutional deprivations. In *Childers* v. *Ind. Sch. Dist. No. 1 of Bryan Cty.*, 676 F.2d 1338, 1343 (10th Cir. 1982), the Tenth Circuit stated that "a plaintiff seeking in federal court to vindicate a federally created right cannot be made to jump through the procedural hoops for tort-type cases that may have commended themselves to the legislative assemblies of the several states." *Burnett* v. *Grattan*, ___ U.S. at ___ n.9, 104 S.Ct. at 2928 n.9, 82 L.Ed.2d at 42 n.9 (1984); *Brown* v. *United States*, 742 F.2d 1498 (D.C.Cir. 1984) *(en banc)* (non-compliance with D.C. notice of claims provision did not bar federal claims), *overruling in part*, *McClam* v. *Barry*, 697 F.2d 366 (D.C.Cir. 1983). From this comprehensive review of the NMTCA, it is clear that the policies and procedures of the NMTCA frustrate and interfere with the implementation of the national policies underlying federal civil rights actions. This Court, in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, at 367, 97 S.Ct. 2447, at 2455, 53 L.Ed.2d 402 (1977), made it clear that the federal policy behind the civil rights statutes must be considered when a choice is to be made among the various state limitation statutes.

> State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of

national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.' [Citations omitted.] State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.'

The structure of the NMTCA impedes the remedial and deterrent purposes of a § 1983 action. The use of N.M. Stat. Ann. § 37-1-8, the New Mexico personal injury statute, which has no restriction on recovery of compensatory damages, which allows for the recovery of punitive damages, which has no restrictive notice provisions, and which does not discriminate between violators, clearly furthers the dual purposes of § 1983. The NMTCA does not.

B. The Application Of The *DeVargas* Decision And The NMTCA To § 1983 Actions Discriminates Against The Federal Cause Of Action And Creates Arbitrary Results That Are Inconsistent With The Constitution And Laws Of The United States.

The step three inquiry of *Burnett* v. *Grattan*—whether a state rule of decision is inconsistent with the Constitution or federal law—is made "when a State legislature has enacted a statute of limitations specifically applicable to actions brought under one or all of the Reconstruction-era Civil Rights Acts." ___ U.S. at ___ n.15, 104 S.Ct. at 2931 n.15, 82 L.Ed.2d at 46 n.15. Discrimination between federal and state claims is inconsistent with the Constitution and federal law. *See e.g.*, *Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978) (rejecting Virginia's express one-year statute of limitations for § 1983 actions as discriminating against federal cause of action because the state personal injury statute was two years).

New Mexico does not have any express statute of limitations that applies to any of the Reconstruction-era Civil Rights actions. The Defendants urge this Court to adopt the statute of limitations assertion posited by the New Mexico Courts in *DeVargas* v. *State ex rel. Dep't. of Corr.*, 97 N.M. 447, 640 P.2d 1327 (Ct.App. 1981), *cert. quashed as improvidently issued*, *State* v. *DeVargas*, 97 N.M. 563, 642 P.2d 166 (1982) (J.A.

15-16). The opinion of the New Mexico Court of Appeals in *DeVargas*, and the Decision on Certiorari by the New Mexico Supreme Court in *DeVargas* (J.A. 15-16) demonstrate a lack of understanding of the significant differences between a tort claims action and a § 1983 action. These decisions are also inconsistent with the subsequent decision of the New Mexico Supreme Court in *Wells* v. *County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982). The effect of the *DeVargas* decision is to single out federally protected rights for harsher and discriminatory treatment as opposed to state protected rights, and to intertwine § 1983 actions with the NMTCA limitations procedures and policies.

In New Mexico, "the nature of the right sued upon, and not the form of action or relief demanded, determines the applicability of the statutes of limitations." *Rito Cebolla Inv. Ltd.* v. *Golden West Land*, 94 N.M. 121, 126-27, 607 P.2d 659, 664-65 (Ct.App. 1980); *Taylor* v. *Lovelace Clinic*, 78 N.M. 460, 462, 432 P.2d 816, 818 (1967). *Cf.*, *Runyon* v. *McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). As has been demonstrated *supra*, at Point I-A, the essential nature of a deprivation of civil rights is an injury to personal rights. *Garcia* v. *Wilson*, 731 F.2d at 651; *Garcia* v. *University of Kansas*, 702 F.2d 849 (10th Cir. 1983). The New Mexico Court of Appeals, in *DeVargas*, ignored the law of New Mexico that the nature of the right determines the applicability of a statute of limitations. 97 N.M. at 451, 640 P.2d at 1331. *Taylor* v. *Lovelace Clinic*, *supra*. Under its interpretation, the claims in *DeVargas* were time barred so the New Mexico Court of Appeals made no choice between the two-year NMTCA statute, or the three-year personal injury statute, N.M.Stat.Ann. § 37-1-8 (1978). 97 N.M. at 451, 640 P.2d at 1331. The New Mexico Supreme Court issued a Decision on Certiorari quashing the Writ of Certiorari as improvidently issued. 97 N.M. 563, 642 P.2d 166 (1982) (J.A. 15).[30] In that decision on certiorari, the

[30] The *DeVargas* Decision on Certiorari was originally not to be published as a Formal Opinion of the New Mexico Supreme Court. Affidavit of Rose Marie Alderete, Clerk, Rule 7, Supreme Court

Court, in *dicta*, stated that the appropriate New Mexico limitations period for § 1983 actions is the two-year limitation period of the NMTCA. 97 N.M. at 564, 642 P.2d at 167.

The *DeVargas* decision on certiorari is flawed in many ways. First, it contains absolutely no effort to characterize the essential nature of a § 1983 action. It is unclear whether the Court applied the NMTCA limitations period to all § 1983 claims, even those not coming within any arguable confines of the NMTCA. (J.A. 15) The decision does not acknowledge the uniquely federal concerns of the Reconstruction-era Civil Rights Acts, and it does not recognize the difference between a tort and a constitutional deprivation. *Compare Wells* v. *County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982).

The *DeVargas* decision also creates a discriminatory effect against federal causes of action. For example, under *DeVargas*, a citizen who suffers a simple assault at the hands of a private party has three years to bring suit (N.M.Stat.Ann. § 37-1-8 (1978)) while a citizen, such as the Plaintiff, who is brutally and viciously beaten by a law enforcement officer acting under color of law, would have only two years to bring suit (N.M.Stat.Ann. § 41-4-15 (1978)). *See Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). This discriminatory result is certainly inconsistent with the Constitution and federal law. *Burnett* v. *Grattan*, ___ U.S. at ___, 104 S.Ct. at 2931, 82 L.Ed.2d at 46. *Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978).

Misc. Rules, Judicial Pamphlet No. 9, 1980 Cum.Supp. (J.A. 19-22). The Decision on Certiorari was published after the Plaintiff filed his Reply to Motion to Call New Authority to Attention of the Court (J.A. 19). The language regarding the appropriate § 1983 limitations period from the New Mexico Supreme Court decision quashing certiorari in *DeVargas* is dicta, and a decision quashing certiorari is of no precedential value and indicates nothing more than the reviewing Court's conclusion that the case ". . . is not appropriate for adjudication." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79, 75 S.Ct. 614, 619, 99 L.Ed. 897 (1955) (on rehearing); *See also Gonzales* v. *Stanke-Brown Assoc., Inc.*, 98 N.M. 379, 388, 648 P.2d 1192, 1201 (Ct.App. 1982) (Sutin, J., specially concurring).

To the extent that the *DeVargas* decision (J.A. 15) is read as uniformly applying the NMTCA limitations period to all § 1983 actions, then this decision applies to cases such as First Amendment public employee free speech cases and Fifth Amendment zoning due process cases. Based upon the underlying conduct analysis urged by the Defendants, these § 1983 causes of action are not remotely analogous or similar to the causes of action created by the NMTCA. If the *DeVargas* decision (J.A. 15) is read as applying solely to law enforcement officers (a point not clear from the decision) as the Defendants are currently advocating, then the decision also has numerous discriminatory and arbitrary results. For instance, in civil rights conspiracy-type cases involving a law enforcement officer and a private individual, or public employee not covered by the NMTCA, the NMTCA two-year limitations period, § 41-4-15, would apply to the law enforcement officer, but either the three-year statute, § 37-1-8, or the four-year statute, § 37-1-4, would apply to the other individuals (Pet. Cert. App. 48). In the same case, different limitations periods would apply to the federal cause of action based upon the status of the violator. In addition, the NMTCA does not apply to the causes of action created by 42 U.S.C. §§ 1981, 1982 and 1985 except as to law enforcement officers, as specified in § 41-4-12.

Among the potential civil rights actions that the Defendants' method would treat in this discriminatory and arbitrary manner, and that are not even necessarily covered by the NMTCA, are a cause of action against a law enforcement officer and a private citizen for conspiracy to violate the constitutional rights of another person. *Cf., Dennis* v. *Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); a cause of action against a law enforcement officer for conspiring with a public employee not covered by the NMTCA to violate the constitutional rights of another person; a claim against a City Manager for violating the constitutional rights of another person; a claim against a City Manager for the failure to train, supervise, discipline and control a municipal police officer who violates the constitutional rights of citizens when the failure directly causes the violation of rights; *McClellan* v. *Facteau*, 610 F.2d 693

(10th Cir. 1979); a substantive due process cause of action against a public employee, like a school teacher, for a brutal and vicious beating administered under color of law by that public employee. *See e.g., Hall* v. *Tawney*, 621 F.2d 607 (4th Cir. 1980); a cause of action on behalf of any public employee, except a police officer for a First Amendment claim. *Perry* v. *Sindermann*, 408 U.S. 598, 92 S.Ct. 2717, 33 L.Ed.2d 570 (1972); and an employment discrimination or retaliatory discharge claim, *see e.g., Hansbury* v. *Regents of the University of California*, 596 F.2d 944 (10th Cir. 1979).

The discriminatory effect on § 1983 actions, created by the *DeVargas* decision on certiorari, which seeks to apply the limitations period for torts contained in the NMTCA to federal civil rights actions, even those not arguably included in the NMTCA, evidences a concept of state sovereign immunity that is hostile to the federal cause of action. Federal Courts have repeatedly refused to engraft such state interpretations onto the federal remedy created by § 1983, and they have refused to allow state concepts of sovereign immunity to undermine the broad, remedial purposes of § 1983. *See e.g., Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984); *Childers* v. *Ind. Sch. Dist. No. 1 of Bryan Cty.*, 676 F.2d 1338, 1342-43 (10th Cir. 1982); *Donovan* v. *Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970); *Gunther* v. *Miller*, 498 F.Supp. 882, 882-83 (D.N.M. 1980).

A state policy which provides citizens a shorter time to sue public employees under a State Tort Claims Act for state-created rights than is allowed for a similar type claim against a private person may be appropriate in view of the policies of repose and the purpose of a State Tort Claims Act which is to restrict government susceptibility to suit. *See Donovan* v. *Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980). It is a far different matter when the discriminatory policy is directed against the remedial federal cause of action embodied in § 1983. Federal Courts will reject the application of any such discriminatory limitations period even where a state legislature has expressly provided for the shorter limitations period for the § 1983 claim than for

similar common law claims. *Burnett* v. *Grattan*, ____ U.S. at ____ n.15, 104 S.Ct. at 2931 n.15; *Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978).

C. The § 1983 Action In This Case Is A Federal Action Filed In Federal Court Seeking The Vindication Of Federal Rights Based Upon A Uniquely Federal Remedy And Is Not Dependent Upon An Interpretation Of State-Created Rights And The Decision To Disregard *DeVargas* Does Not Implicate The Principles Of Federalism.

The Defendants claim that the refusal of the Tenth Circuit to follow *DeVargas* violates the principles of federalism. The conflict regarding the appropriate New Mexico limitations period for § 1983 cases began when the New Mexico Courts in *DeVargas* ignored existing federal precedent. *Hansbury* v. *Regents of the University of California*, 596 F.2d 944 (10th Cir. 1979); *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980). The federal courts in this case have not violated any principles of federalism. This is a federal action in federal court involving the vindication of federal rights based upon a distinctly federal remedy. In *Guaranty Trust Co.* v. *York*, 326 U.S. 99, at 109, 65 S.Ct. 1464, at 1470, 89 L.Ed. 2079 (1945), Justice Frankfurter explained the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938):

> In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal Court should be substantially the same, so far as legal rules determine the outcome of a litigation, as if it would be tried in a State Court.

See also Holmberg v. *Armbrecht*, 327 U.S. 392, 395, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946). The cases cited by the Defendants are inapposite because this is not a case dealing solely with issues of state law that is in the federal Court solely on account of the diversity of citizenship of the parties. *See e.g., Bauserman* v. *Blunt*, 147 U.S. 647, 13 S.Ct. 466, 37 L.Ed. 316 (1893). This is not a case where the rights are derived from state law. *See e.g., Dibble* v. *Bellingham Bay Land Co.*, 163 U.S. 63, 16

S.Ct. 939, 41 L.Ed. 72 (1896); *Leffingwell* v. *Warren*, 67 U.S. (2 Black) 599 (1862). The *Erie* v. *Tompkins* concerns simply do not apply. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946).

The NMTCA limitations provision is not the appropriate nor the most analogous New Mexico limitations period for borrowing purposes to be applied in this case. The history of the Reconstruction-era Civil Rights statutes does not reflect any recognition of the need to split the federal causes of action based upon the underlying conduct of the violator, or the employment, or official status of the violator. The Defendants pose all sorts of scenarios for the violation of federally secured rights, and for the method, manner and status of the violator suggesting somehow that differing limitations periods within the State of New Mexico further the goals of the Reconstruction-era Civil Rights Acts (Pet. Brief 25-37). Yet, the Defendants fail to acknowledge that many causes of action authorized by § 1983, against many different types of potential defendants, are not even covered by the NMTCA. The Defendants propose an ad hoc determination of the appropriate New Mexico limitations period each and every time a § 1983 claim is filed, and for each and every aspect of the claim. They assert that different limitations periods should apply based upon the conduct and status of the offender. This analysis is inconsistent with the legislative history of the Reconstruction-era Civil Rights Acts and has created chaos in the federal Courts.[31] Such a result has been highly unsatisfactory. The time-honored wisdom of *Smith* v. *Cremins*, 308 F.2d 187 (9th Cir. 1962) bears repeating here:

> Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitations applicable to each state-created right were applied to the single federal cause of action.
>
> 308 F.2d at 190

[31] *See* footnotes 9, 11, 13, and accompanying text.

Inconsistency and confusion have arisen from the method advocated by the Defendants. Collateral litigation on these statutes of limitations questions have burdened the federal Courts for years. The Tenth Circuit has developed a consistent approach to the problem of characterization that is firmly defined and easily applied. This manner of characterizing the federal claim is based upon the antecedent context of the development of the federal causes of action and their remedial nature. At the same time, once the federal civil rights action is characterized as an injury to personal rights according to federal law, deference is made to the individual policies of repose of the several states. The Tenth Circuit's method should be followed. It works.

III. Assuming Arguendo That This Court Determines That The New Mexico Statute Of Limitations For A § 1983 Action Is The New Mexico Tort Claims Act Statute, Then This Court Should Follow The Established Rule Of Law And Give The New Interpretation Prospective Application So As To Not Bar The Claim Of The Plaintiff.

The Complaint in this case was filed on January 28, 1982 (J.A. 4). At that time, the United States Court of Appeals for the Tenth Circuit, in *Hansbury* v. *The Regents of the University of California*, 596 F.2d 944, 949 (10th Cir. 1979), and the United States District Court for the District of New Mexico, in *Gunther* v. *Miller*, 498 F.Supp. 882, 882-83 (D.N.M. 1980), had both held that the appropriate New Mexico limitations period which governed the filing of § 1983 actions was the four-year period found in N.M.Stat.Ann. § 37-1-4 (1978). The decision in *Gunther* v. *Miller* specifically rejected the application of the NMTCA two-year limitation period to civil rights actions. 498 F.Supp. at 882-83. In addition, at the time of the filing of this lawsuit, the annotations to the New Mexico Statutes, under the NMTCA statute of limitations provision, specifically stated that the section was inapplicable to federal civil rights

actions.[32] Moreover, it was the settled rule in the Tenth Circuit that where a claim could be characterized in more than one fashion, the longer statute of limitations should be applied. *Shah* v. *Halliburton*, 627 F.2d 1055, 1059 (10th Cir. 1980), *overruled*, *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984).

At the time of the filing of the lawsuit in this case, no decision existed which stated that the proper statute of limitations under New Mexico law for suits filed under § 1983 is the two-year statute found in the NMTCA, § 41-4-15. The *DeVargas* decision of the intermediate New Mexico Court of Appeals, while improperly rejecting the federal analysis regarding the statute of limitations approved by the Tenth Circuit, and the New Mexico Federal District Courts, specifically did not decide whether the appropriate New Mexico statute of limitations for filing suits pursuant to 42 U.S.C. § 1983 is two or three years. 97 N.M. at 451, 640 P.2d at 1331. The Decision on Certiorari issued by the New Mexico Supreme Court, which quashed certiorari in *DeVargas*, was not decided until after this lawsuit was filed (J.A. 15-16). 97 N.M. 563, 642 P.2d 166 (1982).

The Plaintiff relied on federal precedent in filing his federal civil rights action. *Hansbury* v. *Regents of the University of California; Gunther* v. *Miller; Shah* v. *Halliburton*. The Tenth Circuit has ruled that the claim in this case was timely filed. 731 F.2d at 651. But, if this court should determine that the NMTCA two-year limitation applies to the Complaint in this case, the Plaintiff should nonetheless be allowed to proceed, and the Court should make its holding prospective only. *Jackson* v. *City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984);

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[32] The annotation to N.M.Stat.Ann. § 41-4-15 (Cum.Supp. 1981) reads:

> *Section inapplicable to federal civil rights action.*—An action under 42 U.S.C. § 1983 for excessive use of force during an arrest is not governed by the limitations on actions contained in this section but by the general statutory limitations on actions for personal injury, 37-1-8 NMSA 1978, or for miscellaneous claims, 37-1-4 NMSA 1978. *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980).

Abbitt v. *Franklin*, 731 F.2d 661 (10th Cir. 1984); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). In *Chevron*, this Court noted the three factors which are relevant to the non-retroactive application of judicial decisions. 404 U.S. at 106-07, 92 S.Ct. at 355-56.

The Court, in *Jackson* v. *City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984) *(en banc)*, stated that the *Chevron* "approach has consistently been utilized where changes in statute of limitations or other aspects of the timeliness of a claim are at issue." *Occhino* v. *United States*, 686 F.2d 1302, 1308 n.7 (8th Cir. 1982). *See also Singer* v. *Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 346-48 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954, 101 S.Ct. 3098, 69 L.Ed.2d 965 (1981).

An analysis of the *Chevron* criteria demonstrates that the Plaintiff in this case is clearly entitled to nonretroactive application of any new interpretation of the § 1983 statute of limitations period. The clear past precedent upon which the Plaintiff relied in filing this case regarding the New Mexico statute of limitations for actions filed pursuant to § 1983 were the federal decisions of the Tenth Circuit in *Hansbury* and *Shah* and the Federal District Court in *Gunther*. The Plaintiff was, and is, entitled to rely upon these two decisions and precedence for the timely filing of his Complaint in this case. "*Chevron* mandates nonretroactive application of a statute of limitations decision that overrules the weight of past precedent." *Wachovia Bank & Trust Co.* v. *Nat. Student Marketing*, 650 F.2d at 347. If this Court were to adopt the reasoning advanced by the Defendants and require that the NMTCA two-year statute of limitations be applied to this § 1983 action, this Court would cleary be overruling the weight of past precedent, and nonretroactive application of the decision would be proper. *Jackson* v. *City of Bloomfield*, *supra*.

The second criterion stated in *Chevron* also supports nonretroactive application of any change in the statute of

limitations. For the reasons stated in this Brief, the proper limitations period for § 1983 actions filed in New Mexico is N.M.Stat.Ann. § 37-1-8, the personal injury statute. *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984). But, if this Court were to decide to change the existing interpretation of the law, it must also consider that any change in the statute of limitations would hinder the federal policy of encouraging the remedial use of § 1983 suits in the federal Courts for litigants in New Mexico who relied on federal precedent.

Lastly, the third criterion of the *Chevron* test mandates prospectivity if this Court were to change the statute of limitations to the NMTCA period specifically rejected in *Gunther*. For if that occurred, as in *Chevron*, "[i]t would also produce the most 'substantial inequitable results' to hold that [plaintiff] 'slept on [his] rights' at a time when [he] could not have known the time limitation that the law imposed upon [him]." 404 U.S. at 108, 92 S.Ct. at 356. *Jackson* v. *City of Bloomfield*, 731 F.2d at 655. *Abbitt* v. *Franklin*, 731 F.2d 661 (10th Cir. 1984).

Therefore, for all the foregoing reasons, if this Court should change the interpretation of the statute of limitations, as it applies to § 1983 actions filed in New Mexico, to be the limitations period of the NMTCA, § 41-4-15, then this new interpretation should be given prospective application so as to not bar the claim of the Plaintiff.

CONCLUSION

For all the foregoing reasons, the Respondent, Gary Garcia, respectfully Requests that the judgment of the United States Court of Appeals for the Tenth Circuit be affirmed. In the alternative, if this Court should determine to reverse the Court below, then the Respondent respectfully requests that said decision be applied prospectively only.

Respectfully submitted,

/s/Steven G. Farber
STEVEN G. FARBER
411 Hillside Avenue
P.O. Box 2473
Santa Fe, New Mexico 87504
505/988-9725

RICHARD ROSENSTOCK
P.O. Box 186
Chama, New Mexico 87520
505/756-2517

Attorneys For Respondent,
Gary Garcia

APPENDIX

APPENDIX

PART A: STATUTES:

Section 3 of the Civil Rights Act of April 9, 1866:

As enacted, § 3 of the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27, read, in part, as follows:

'That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act. . . . The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.'

Section 1 of the Civil Rights Act of April 20, 1871:

Section 1 of the Act of April 20, 1871, taken from the Appendix to the Congressional Globe, 42nd Cong. 1st Session, 335, 17 Stat. 13, reads:

> CHAP. XXII.—An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication;' and the other remedial laws of the United States which are in their nature applicable in such cases.

Revised Statute § 722:

Revised Statute § 722 reads as follows:

SEC. 722. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

PART B: INJURY TO PERSONAL RIGHTS OR PERSONAL INJURY STATUTES OF LIMITATION: 50 STATE SURVEY

State	No. of Years	Statute
Alabama	1	Ala.Code § 6-2-39(a) (5) (1975) (*Rubin* v. *O'Koren*, 644 F.2d 1023 (5th Cir. 1981))
Alaska	2	Alaska Stat. § 09.10.070(1) (1973) (*Austin* v. *Fulton Insurance Co.*, 444 P.2d 536 (Alaska 1968))
Arizona	2	Ariz.Rev.Stat.Ann. § 12-542(1) (1982) (*Hansen* v. *Stoll*, 130 Ariz. 454, 636 P.2d 1236 (Ariz.App. 1981))
Arkansas	3	Ark.Stat.Ann. § 37.206 (1947) (*Simpson* v. *Bailey*, 729 Ark. 27, 648 S.W.2d 464 (1983))
California	1	Cal.Civ.Proc. Code § 340(3) (West 1982) (*Rubino* v. *Utah Canning Co.*, 123 C.A.2d 18, 266 P.2d 163 (1954))
Colorado	3	Colo.Rev.Stat. § 13-80-108(1) (b) (1973) (*McKay* v. *Hammock*, 730 F.2d 1367 (10th Cir. 1984))
Connecticut	2	Conn.Gen.Stat. § 52-584 (1983) (*McDonald* v. *Haynes Medical Laboratory, Inc.*, 192 Conn. 327, 471 A.2d 646 (1984))
Delaware	2	Del. Code Ann. tit. 10, § 8119 (1974) (*Shaw* v. *Aetna Life Insurance Co.*, 395 A.2d 384 (Delaware 1978))

State	No. of Years	Statute
D.C.	3	D.C. Code Ann. § 12-301(8) (1981) (*Estate of Chappelle* v. *Sanders*, 442 A.2d 157 (D.C. App. 1982))
Florida	4	Fla.Stat. § 95.11(3) (1983) (*Gasparro* v. *Horner*, 245 So.2d 901 (Fla. 1971))
Georgia	2	Ga. Code § 3-1004 (1975) (*Leggett* v. *Benton Bros. Drayage & Storage Co.*, 138 Ga.App. 761, 227 S.E.2d 397 (1976))
Hawaii	2	Hawaii Rev.Stat. § 657-7 (1976) (*Azada* v. *Carson*, 252 F.Supp. 988 (D.Hawaii 1966))
Idaho	2	Idaho Code § 5-219(4) (1979) (*Billings* v. *Sisters of Mercy of Idaho*, 86 Idaho 485, 389 P.2d 224 (1964))
Illinois	2	Ill.Rev.Stat.Ch. 110, § 13-202 (1983) (*Mitchell* v. *White Motor Company*, 58 Ill.2d 159, 317 N.E.2d 505 (1974))
Indiana	2	Ind. Code § 34-1-2-2(1) (1973) (*Tolen* v. *A.H. Robins Co., Inc.*, 570 F.Supp. 1146 (N.D.Indiana 1983))
Iowa	2	Iowa Code § 614.1(2) (1983) (*Gookin* v. *Norris*, 261 N.W.2d 692 (Iowa 1978))
Kansas	2	Kan.Stat.Ann. § 60-513(a) (4) (1976) (*Pike* v. *City of Mission, Kan.*, 731 F.2d 655 (10th Cir. 1984))

State	No. of Years	Statute
Kentucky	1	Ky.Rev.Stat. § 413.140(a) (Ky. 1972) (*Blackburn* v. *Burchett*, 335 S.W.2d 342 (1960))
Louisiana	1	La.Civ.Code Ann. art. 3536 (1953) (*Warner* v. *New Orleans & C.R. Co.*, 134 La. 897, 64 So. 823 (1901))
Maine	6	Me.Rev.Stat.Ann. tit. 14, § 752 (1980) (*Williams* v. *Ford Motor Co.*, 342 A.2d 712 (Me. 1975))
Maryland	3	Md.Cts. & Jud.Proc. Code Ann. § 5-101 (1984) (*Davidson* v. *Koerber*, 454 F.Supp. 1256 (1978))
Massachusetts	3	Mass.Gen.Laws Ann.Ch. 260, § 2A (1980) (*Baldassari* v. *Public Finance Trust*, 369 Mass. 33, 337 N.E.2d 701 (1975))
Michigan	3	Mich.Comp. Laws Ann. § 600.5805(8) (Cum.Supp. 1984) (*Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973))
Minnesota	2	Minn.Stat. § 541.07(1) (1982) (*Wild* v. *Rarig*, 302 Minn. 419, 234 N.W.2d 775 (1975))
Mississippi	6	Miss. Code Ann. § 15-1-49 (1972) (residual provisions) (*Nelson* v. *James*, 435 So.2d 1189 (Miss. 1983))
Missouri	5	Mo.Rev.Stat. § 516.120(4) (1978) (*Tretter* v. *Johns-Manville Corp.*, 88 F.R.D. 329 (E.D.Mo. 1980))

State	No. of Years	Statute
Montana	3	Mont. Code Ann. § 27-2-204(1) (1983) (*Much* v. *Sturm, Ruger & Co., Inc.*, 502 F.Supp. 743 (D.Montana 1980))
Nebraska	4	Neb.Rev.Stat. § 25-207(3) (1979) (*Grand Island School District #2* v. *Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979))
Nevada	2	Nev.Rev.Stat. § 11.190(4) (e) (1979) (*Meadows* v. *Sheldon Pollack Corp.*, 92 Nev. 636, 556 P.2d 546 (1976))
New Hampshire	6	N.H.Rev.Stat.Ann. § 508:4(I) (1983) (*Robbins* v. *Seakamp*, 122 N.H. 318, 444 A.2d 537 (1982))
New Jersey	2	N.J.Rev.Stat. § 2A:14-2 (1952) (*Rex* v. *Hunter*, 26 N.J. 489, 140 A.2d 753 (1958))
New Mexico	3	N.M.Stat.Ann. § 37-1-8 (1978) (*Hartford* v. *Gibbons & Reed Co.*, 617 F.2d 567 (10th Cir. 1980))
New York	3	N.Y.Civ.Prac. Law § 214(5) (1978) (*Levine* v. *Sherman*, 384 N.Y.S.2d 685, 86 Misc.2d 997 (1976))
North Carolina	3	N.C.Gen.Stat. § 1-52(5) (1983) (*Sheppard* v. *Barrus Construction Co.*, 11 N.C.App. 358, 181 S.E.2d 130 (1971))

State	No. of Years	Statute
North Dakota	6	N.D.Cent. Code § 28-01-16(5) (1974) (*Keller* v. *Clark Equipment Co.*, 474 F.Supp. 966 (D.North Dakota 1979))
Ohio	4	Ohio Rev.Code Ann. § 2305.09(D) (1981) (*Schorle* v. *City of Greenhills*, 524 F.Supp. 821 (S.D.Oh. 1981))
Oklahoma	2	Okla.Stat. tit. 12, § 95(3) (1981) (*Abbitt* v. *Franklin*, 731 F.2d 661 (10th Cir. 1984))
Oregon	2	Or.Rev.Stat. § 12.110(1) (1983) (*U.S. National Bank of Oregon* v. *Davies*, 274 Or. 663, 548 P.2d 966 (1976))
Pennsylvania	2	Pa.Cons.Stat. § 42-5524(2) (1981) (*Donnelly* v. *DeBourke*, 280 Pa.Super. 486, 421 A.2d 826 (1980))
Puerto Rico	1	P.R. Laws Ann. tit. 31, § 5298(2) (1968) (*Graffels Gonzalez* v. *Garcia Santiago*, 550 F.2d 687 (1st Cir. 1977) *per curiam*))
Rhode Island	3	R.I.Gen. Laws § 9-1-14 (1956) (*Walden, III, Inc.* v. *Rhode Island*, 576 F.2d 945 (1st Cir. 1978))
South Carolina	6	S.C. Code Ann. § 15-3-530(5) (1976) (*Simmons* v. *South Carolina State Ports Authority*, 694 F.2d 63 (4th Cir. 1982))

State	No. of Years	Statute
South Dakota	3	S.D. Codified Laws Ann. § 15-2-14(3) (1984) (*Titze* v. *Miller*, 337 N.W.2d 176 (S.D. 1983))
Tennessee	1	Tenn. Code Ann. § 28-3-104(a) (1980) (*Brown* v. *Dunstan*, 219 Tenn. 291, 409 S.W.2d 365 (1966))
Texas	2	Tex.Stat.Ann. art. 5526(6) (1958) (*Braden* v. *Texas A & M University System*, 636 F.2d 90 (5th Cir. 1981))
Utah	4	Utah Code Ann. § 78-12-25(2) (1953) (*Matheson* v. *Pearson*, 619 P.2d 321 (Utah 1980))
Vermont	3	Vt.Stat.Ann. tit. 12, § 512(4) (1974) (*Kinney* v. *Goodyear Tire & Rubber Co.*, 134 Vt. 571 367 A.2d 677 (1976))
Virginia	2	Va. Code § 8.01-243(A) (1950) (*Runyon* v. *McCrary*, 427 U.S. 160 (1976))
Virgin Islands	2	V.I. Code Ann. tit. 5, § 31(5)(A) (1950)
Washington	3	Wash.Rev. Code § 4.16.080(2) (1983) (*Rose* v. *Rinaldi*, 654 F.2d 546 (9th Cir. 1981))

State	No. of Years	Statute
West Virginia	2	W.Va. Code § 55-2-12 (1981) (*McCausland* v. *Mason County Bd. of Educ.*, 649 F.2d 278 (4th Cir.), *cert. denied*, 454 U.S. 1098 (1981))
Wisconsin	3	Wis.Stat. § 893.54 (1983) (*Pulchinski* v. *Strnad*, 88 Wis.2d 423, 276 N.W.2d 781 (1979))
Wyoming	4	Wyo.Stat. § 1-3-105(a)(iv)(c) (1973) (*Riley* v. *Union P.R.R.*, 182 F.2d 765 (10th Cir. 1950))